No. _____

In The

Supreme Court of the United States

MARINE FORESTS SOCIETY and
RODOLPHE STREICHENBERGER,

Petitioners,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state supreme court suddenly and arbitrarily change state law, unpredictable in terms of relevant precedents, so as to allow the state to defeat the constitutional protection against taking property without payment of just compensation and without due process of law or has a federal issue arisen making the exercise of this Court's review power necessary?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are the petitioners Marine Forests Society and its founder and president Rodolphe Streichenberger (Marine Forests) and the respondent California Coastal Commission (Coastal Commission or Commission).

Petitioner Marine Forests is a nonprofit organization whose purpose is to conduct experimental research on creating new or replacing lost marine habitat. The organization's objective is to discover economically viable techniques that facilitate the creation of large-scale marine forests where seaweed and shellfish can grow on sandy ocean bottoms and attract fish. App. A at 6.

The California Coastal Commission is a California state agency created by the California Coastal Act of 1976 (Coastal Act or Act). The Act is a very lengthy and comprehensive statutory scheme aimed at protecting the coastal zone. The Commission is the entity charged with the primary responsibility for the implementation of the provisions of the Coastal Act. App. A at 12.

CORPORATE DISCLOSURE STATEMENT

Petitioner Marine Forests Society is a nonprofit corporation. As a nonprofit corporation, the Marine Forests Society has no parent corporation or stock owned by any publicly held company.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The June 23, 2005 opinion of the California Supreme Court was reported as *Marine Forests Society, et al. v. California Coastal Commission, et al.*, Case No. S113466. The entire opinion appears as Appendix A to this Petition.[1] It is also reported at *Marine Forests Society, et al. v. California Coastal Commission, et al.*, 36 Cal. 4th 1, 113 P.3d 1062 (2005). The opinion issued on December 30, 2002, by the California Court of Appeal, Third Appellate District, was reported as *Marine Forests Society, et al. v. California Coastal Commission, et al.*, Case No. C038753. The entire opinion appears as App. B to this Petition. The court of appeal's entire ruling on rehearing appears as App. C to this Petition. The Sacramento County Superior Court's decision in case number 00AS00567 issued on May 8, 2001, is included as Exhibit 1 to App. G.

JURISDICTION

The California Supreme Court issued its opinion on June 23, 2005. App. A at 1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTE AT ISSUE

The Fifth Amendment to the United States Constitution provides:

[1] All further references to appendices hereto are shown as App.

> *No person shall* be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor ***be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.***

(Emphasis added.)

The Fourteenth Amendment, § 1, to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ***nor shall any State deprive any person of life, liberty, or property, without due process of law***; nor deny to any person within its jurisdiction the equal protection of the laws.

(Emphasis added.)

The California Constitution Separation of Powers Clause provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Cal. Const. art. III, § 3.

In California, a quo warranto proceeding is governed by California Code of Civil Procedure § 803, which provides:

> ***An action may be brought by the attorney-general, in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who*** usurps, intrudes into, or ***unlawfully holds or exercises any public office***, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state. And the attorney-general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the governor.

(Emphasis added.)

STATEMENT OF THE CASE

A. Procedural Background

The California Coastal Commission is the "state coastal zone planning and management agency" with primary responsibility for implementing the California Coastal Act of 1976. It consists of 12 voting members, 4 appointed by the governor and 8 appointed by the legislature. Prior to 2003, all members served two-year terms at the pleasure of their appointing authorities. The Commission acts by a majority vote of its appointed members. App. B at 88.

On October 28, 1999, the Commission notified the Marine Forests Society that it intended to commence cease and desist proceedings regarding Marine Forests' experimental man-made reef on the ocean floor off of Newport Beach in Orange County, California. Marine Forests filed an action on January 31, 2000, seeking to enjoin the Commission from doing so. Marine Forests claimed, among other things, that the Commission did not have the authority to issue cease and desist orders or to grant or deny developmental permits because the appointment scheme of its voting members gives the legislative branch control over the Commission, thus impermissibly allowing the legislative branch to control the executive branch's responsibility to faithfully execute the laws. App. B at 88-89.

Based on the Undisputed Stipulated Facts for Summary Adjudication, App. D at 118, the trial court on May 8, 2001, held that the power of the Senate Committee on Rules and the Speaker of the Assembly to remove a majority of the Commission's voting members at the pleasure of those appointing authorities effectively makes the Commission a "legislative agency." Therefore, the court enjoined the Commission "as a legislative body . . . from exceeding its jurisdiction and violating the Separation of Powers Clause of the California Constitution [Cal. Const. art. III, § 3] which precludes it from granting, denying or conditioning permits or [from] issuing and hearing cease and desist orders." The Commission appealed. App. B at 93-94.

On appeal, the California Court of Appeal, Third Appellate District, concluded on December 30, 2002, that the Commission's interpretation and implementation of the California Coastal Act of 1976 is an executive function,

and that the appointment structure giving the Senate Committee on Rules and the Speaker of the Assembly the power not only to appoint a majority of the Commission's voting members, but also to remove them at will contravenes the separation of powers clause of California's Constitution. The flaw was that the unfettered power to remove the majority of the Commission's voting members, and to replace them with others if they act in a manner disfavored by the Senate Committee on Rules and the Speaker of the Assembly, makes those Commission members subservient to the Legislature. The appellate court found that this unrestrained power to replace a majority of the Commission's voting members, and the presumed desire of those members to avoid being removed from their positions, allows the legislative branch not only to make the law but also to control the Commission's execution of the law. App. B at 89-90. As a legislative body, the Commission would be limited to rule making and setting policy pursuant to the Coastal Act.

In affirming the judgment, the court of appeal emphasized that Marine Forests had made a timely separation of powers objection and pursued its remedies in a timely manner. The court expressly did not address the rights and interests of other parties to prior actions of the Commission. App. B at 90.

Following the court of appeal's decision, the California Legislature amended the statute by changing the two-year term of legislatively appointed commissioners to four years and eliminating the legislature's power to remove commissioners "at will." However, it left the legislature free rein to appoint two-thirds of the commissioners and remove or reappoint them at the end of their four-year terms. The

statute, Assembly Bill 1X, became effective on May 20, 2003. App. A at 2-3.

On April 9, 2003, the California Supreme Court granted review and expanded the issues to include the constitutionality of the "corrective" legislation, the retroactive implications, and the appropriate remedy. App. E at 131. These issues did not affect Marine Forests, which had filed a timely action under the prior law in existence since 1976. App. B at 90.

On June 23, 2005, the California Supreme Court issued its opinion, finding that the corrective legislation was constitutional and that the Coastal Commission's structure beginning May 20, 2003, was valid and did not violate California's separation of powers clause. App. A.

However, as to the *Marine Forests* case, in which a timely separation of powers challenge to the Commission's composition had been raised (App. B at 90) and remained pending before the courts, the court concluded:

> [T]here is no need to determine definitively the validity of the earlier statutory provisions in order to clarify the status of the numerous actions that were taken by the Commission at a time when its members were selected and served pursuant to the provisions of those statutes. As we shall explain, even if we were to assume (as Marine Forests contends) that the prior version of the statutes violated the separation of powers clause, the past actions of the Commission could not properly be set aside on that ground at this time.

App. A at 68.

The court further concluded:

> [U]nder the "de facto officer" doctrine prior actions of the Commission cannot be set aside on the ground that the appointment of the commissioners who participated in the decision may be vulnerable to constitutional challenge. . . . The lawful acts of an officer *de facto*, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it.

App. A at 69.

Marine Forests filed a timely action (App. B at 90) and challenged neither the appointment power of the legislature nor any individual commissioner's title to office. *See infra* Section II. Rather, Marine Forests challenged the Commission's exercise of executive and judicial branch functions so long as two-thirds of the Commission were appointed by the legislative branch and served at its will. This separation of powers challenge was directed at the Commission's exercise of certain powers and did not relate to the legislature's ability to establish the appointment process. *See infra* Section II. The court's rationale deprived Marine Forests of due process of law and was unprecedented under California law, the laws of every other state, as well as federal law. *See infra* Section III.

B. Factual Background

After incorporating in 1986, Marine Forests planted its first experimental marine forest on a sandy plain approximately 300 yards offshore of the Balboa Peninsula

in Newport Beach, California.[2] This project was approved and permitted for Marine Forests by the City of Newport Beach, the trustee of the submerged lands where the project took place. It also was approved by the California Department of Fish and Game and the California Integrated Waste Management Board. Marine Forests did not seek permission for its activities from the California Coastal Commission. App. A at 6.

In June 1993, the staff of the Coastal Commission informed Marine Forests that it was required to apply to the Commission for a permit to conduct its activities on the submerged lands of the City of Newport Beach. In 1995, Marine Forests applied for an "after-the-fact" permit. In April 1997, the Commission denied Marine Forests' application for the permit and thereafter directed its staff to commence enforcement proceedings against Marine Forests and compel it to cease and desist performing the contested operations. In 1999, the Commission's executive director issued a "Notice of Intent to Commence Cease and Desist Order Proceedings" against Marine Forests. App. A at 6-7.

In response to the issuance of the notice of intent to commence cease and desist proceedings, Marine Forests filed this proceeding in superior court for ***declaratory and injunctive relief***, seeking to enjoin the Commission from pursuing enforcement proceedings against it. The

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[2] A 10-minute videotape of this under sea project is contained in Exhibit 1 to the Declaration of Rodolphe Streichenberger in the Joint Appendix in Lieu of Clerk's Transcript, Bates No. 00375, filed on December 14, 2001. This video properly portrays Marine Forests' project and its property interests affected by the California Supreme Court's decision.

complaint filed by Marine Forests maintained, in its initial cause of action, that the Commission lacked authority to pursue enforcement proceedings. Marine Forests asserted that, because a majority of the voting members of the Commission were appointed by the Senate Rules Committee and the Speaker of the Assembly and served at the will of their appointing authority, the Coastal Commission must be considered a "legislative body" for purposes of the separation of powers clause of the California Constitution. Therefore, the Commission lacked the authority either to grant, deny, or condition a permit or to conduct a hearing and issue a cease and desist order. After the filing of the complaint, both parties moved for summary adjudication on the separation of powers cause of action, App. A at 7, based on undisputed stipulated facts filed on February 15, 2001. App. D at 118.

To force Marine Forests to remove its project will not only destroy a marine habitat that required years to establish, but also will destroy the proofs of Marine Forests' successful techniques. These techniques include the development of a marine habitat by the use of low-density artificial substrates on a sandy bottom. Marine Forests' techniques are properties of value which took 19 years to invent and experiment. More years are needed to evaluate the aging phenomenon of the unique artificial substrates.

REASONS FOR GRANTING THE PETITION

I. THE CALIFORNIA SUPREME COURT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS THAT THE EXERCISE OF THIS COURT'S REVIEW POWER IS NECESSARY

A state supreme court cannot suddenly change state law, unpredictable in terms of relevant precedents, so as to allow a state agency to take private property without payment of just compensation and without due process of law. Here, the state is being allowed to destroy Marine Forests Society's marine habitat without paying just compensation. *See supra* last paragraph of B, Factual Background. The California Supreme Court's action raises a federal question necessary for this Court to review. This Court stated in *Bonelli Cattle Company v. State of Arizona*, 414 U.S. 313, 331, 94 S. Ct. 517, 528-529 (1973):

> As Mr. Justice Stewart warned in *Hughes v. Washington*, 389 U.S., at 298, 88 S.Ct., at 443 (concurring opinion): "Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property – without paying for the privilege of doing so . . . (T)he Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate. . . ."

Justice Stewart further stated in *Hughes v. State of Washington*, 389 U.S. 290, 296-297, 88 S. Ct. 438, 442 (1967):

> To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court.

In *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 114 S. Ct. 1332, 1335-1336 (1994), the U.S. Supreme Court denied the petition for writ of certiorari submitted by a group of Oregon property owners. Justice Scalia, with whom Justice O'Connor joined, wrote a five-page dissent to the denial stating:

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded." . . .
>
> . . . petitioners must be afforded an opportunity to make out their constitutional claim by demonstrating that the asserted custom is pretextual. If we were to find for petitioners on this point, we would not only set right a procedural injustice, but would hasten the clarification of Oregon substantive law that casts a shifting shadow upon federal constitutional rights the length of the State.

I would grant the petition for certiorari with regard to the due process claim.

A federal court, even this Court, must be especially hesitant to declare that a state judicial decree, defining state law, violates the Constitution. Yet, the Court has long ago settled that state judicial action is subject to constitutional scrutiny. *See, e.g., Ex Parte Virginia*, 100 U.S. 339, 25 L. Ed. 676 (1879); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 96 S. Ct. 2791 (1976). *See also Pulliam v. Allen*, 466 U.S. 522, 536-545, 104 S. Ct. 1970, 1976-1983 (1984). In a variety of contexts, moreover, the decision of a state court has been reviewed by this Court to determine whether it has made such an arbitrary or unpredictable declaration of local law as to deny due process or otherwise deprive the petitioner of a federal right. *See, e.g., Ward v. Board of County Commissioners of Love County*, 253 U.S. 17, 22, 24, 40 S. Ct. 419, 421 (1920); *Georgia Railway & Power Co. v. Town of Decatur*, 262 U.S. 432, 438, 43 S. Ct. 613, 615-616 (1923); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98-99, 58 S. Ct. 443, 445 (1938); *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42-43, 64 S. Ct. 384, 388 (1944); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-458, 78 Ct. 1163, 1169-1170 (1958); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 293-302, 84 S. Ct. 1302, 1306-1311 (1964); *Bouie v. City of Columbia*, 378 U.S. 347, 355-362, 84 S. Ct. 1697, 1703-1707 (1964). Indeed, in *Muhlker v. New York & Harlem Railroad*, 197 U.S. 544, 570, 25 S. Ct. 522, 528 (1905), the Court struck down a state court judgment expressly on the ground that it effected an uncompensated taking of property. *See also Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88, 43 S. Ct. 60, 64 (1922) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003,

1030, 112 S. Ct. 2886, 2901 (1992). For a pertinent historical analysis *see* Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 379 Utah L. Rev. 423-438 (2001).

Of particular note is the conclusion in *Hughes v. State of Washington*, 389 U.S. at 297, that "whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court."

Here, the Coastal Commission insists on eliminating the environmentally significant efforts of a group that has dedicated its life to bettering marine habitat. In fact, the Marine Forests Society recently received from the 2004 Governor's Environmental and Economic Leadership a certificate of recognition for "meritorious contributions to environmental protection and resource conservation in the State of California." App. F at 133.

As a result of the Coastal Commission's unlawful efforts, the Commission will prevent Marine Forests from continuing with its nearly 19-year-old project, which now is more than a mere experiment. It is a mature marine habitat. In fact, the Commission is attempting to direct that the entire Marine Forests' project be removed from Newport Harbor. App. A at 6-7.

If the California Supreme Court's decision remains standing, that court will have allowed a state agency to take Marine Forests' project without just compensation[3] or

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[3] This would qualify as "categorical takings" under *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1027-1029, 112 S. Ct. at 2899-2900.

due process of law. The California Supreme Court denied Marine Forests due process of law by suddenly, arbitrarily and pretextually changing state law. This ruling was entirely unpredictable in terms of relevant precedents. *Hughes*, 389 U.S. at 296-97, 88 S. Ct. at 442.

II. THE DE FACTO OFFICER DOCTRINE DOES NOT APPLY TO MARINE FORESTS' SEPARATION OF POWERS ACTION

The California Supreme Court erred by arbitrarily applying a doctrine in the *Marine Forests* decision that had been previously applied only in the case of a defect in the appointment of a public official. *See infra* Section IV, A. Instead, the doctrine was applied here, where there was no issue of a defect in office and no challenge directed to the appointment process of the commissioners. The court erred in applying this doctrine to block a valid separation of powers challenge to the exercise of certain powers by the lawful agency and its lawful commission. *See infra* Section IV, A. Marine Forests did not seek or obtain the elimination of the agency or any of its commissioners. DVD[4] at 39:16. As stated by Marine Forests Society during oral argument, "We are not challenging the appointments power exercised in this situation; we're challenging the separation of powers which is a totally different thing." DVD at 36:33. "We are not relying on federal law regarding

[4] The subject oral argument on April 6, 2005, was televised and a digital video disk (DVD) of the proceedings was made available. The DVD has a running time of the argument shown on the side. Pending the availability of a transcript, the petitioners will refer to the timed references which can later be compared to the transcript. The oral argument can be seen on the archives for April 6, 2005, at www.calchannel.com.

appointments." DVD at 37:01. "We are not saying the Commission goes out of existence, we are not arguing that. We are not arguing that the commissioners haven't been appointed properly, because they have." DVD at 39:16. "We are not challenging their exercise of the appointments power." DVD at 54:04.

The full extent of the application by the court of the de facto officer doctrine to Marine Forests' separation of powers challenge was not apparent until the subject opinion was issued. The court never addressed this issue to Marine Forests during oral argument.

Both the quo warranto and de facto officer doctrines were not at issue nor were they raised by the parties before the trial court or the court of appeal. App. B and G (Exhibit 1), Respondents' June 16, 2003 Answer Brief on the Merits at page 34. They were first addressed by the Coastal Commission before the California Supreme Court in its Petitioner's Brief on the Merits beginning at page 48. Marine Forests responded on June 16, 2003, beginning at page 34 of its Answer Brief on the Merits. *See also* Marine Forests' Plaintiff's and Respondent's Supplemental Reply Brief at pages 4-10 filed on January 24, 2005.

III. THERE IS NO FEDERAL OR STATE PRECEDENT FOR THE CALIFORNIA SUPREME COURT'S RULING

Marine Forests is unaware of any state or federal court's use of the de facto officer doctrine in the absence of a defect in an officer's ***title*** to office or to enjoin an officer *de jure* from exercising powers beyond his constitutional limits. While the California Supreme Court used this concept because it was concerned about the number of

administrative rulings that might potentially be affected, App. A at 66-67, it failed to appreciate that its ruling already had barred challenges where the statute of limitations had run or res judicata principles were applicable. App. A at 68-69. These prohibitions are not applicable to Marine Forests, as its action was timely. App. B at 90. In fact, the Coastal Commission admits that there are only about 23 cases that raised the separation of powers issue after Marine Forests had prevailed below. (Commission's February 10, 2003 Request for Judicial Notice, Exhibit A, Exhibits 1 and 2). It is unclear if these 23 cases were timely filed.

IV. THE CALIFORNIA SUPREME COURT'S SEPARATION OF POWERS CLAUSE RULINGS DO NOT APPLY TO THE MARINE FORESTS SOCIETY

The California Supreme Court set up additional hurdles attempting to block all separation of powers claims against the Coastal Commission. Like the de facto officer doctrine, none of these apply to Marine Forests. This is further evidence of the pretextual nature of the California Supreme Court's decision.

A. The Separate Proceeding Requirement Is Not Applicable

In the California Supreme Court's decision, App. A at 70, the court suggests that a separation of powers challenge must be raised and resolved in a separate proceeding. The decisions cited by the court are founded in the application of quo warranto reasoning. The Commission tried to argue that a quo warranto action was a required

condition precedent for anyone other than Marine Forests to bring a separation of powers challenge such as was done in the present case. Commission's May 9, 2003 Petitioner's Brief on the Merits beginning at page 50, *see also* footnote 5 *infra*.

In California, a quo warranto proceeding is governed by California Code of Civil Procedure § 803, which in part provides: "An action may be brought by the attorney-general, in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who . . . unlawfully holds or exercises any public office. . . ."

This statute is not applicable to Marine Forests as there was no challenge to the lawfulness of anyone holding any public office. Furthermore, the Commission expressly waived this issue as to the Marine Forests Society while under the California Supreme Court's review. Commission's May 9, 2003 Petitioner's Brief on the Merits beginning at page 50[5]; Marine Forests' June 16, 2003 Respondent's Answer Brief on the Merits beginning at page 34 and related Respondent's June 16, 2003 Request for Judicial Notice (rejected by California Supreme Court, App. A at 67, n.25).

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[5] In its Petitioner's Brief on the Merits before the California Supreme Court, the California attorney general on behalf of the Commission stated: "Although it would not serve judicial efficiency or the public interest to require that MFS now seek leave of the Attorney General, any remedy issued by the Court should be the same as if the action had been brought in quo warranto. The Court should also affirm that, absent waiver, quo warranto is the exclusive remedy for future challenges to any agency's composition." Petitioner's Brief on the Merits beginning at page 50.

In fact, Marine Forests did file two separate actions. The first was the subject case alleging a violation of the separation of powers clause. The second action was to invalidate the subsequent cease and desist order. Sacramento County Superior Court Action No. 00AS03293, App. G at 134 (the trial court opinion in the subject action No. 00AS00567 is included as Exhibit 1 to App. G at 136).

The subject of separate proceedings is most significant to this Petition. Despite the fact that the Commission waived this issue, the California Supreme Court addressed it in its June 23, 2005 decision. App. A at 70. It was never an issue before the trial court, court of appeal or California Supreme Court levels. ***It was not briefed by the parties and not raised by the Supreme Court or the parties at the April 6, 2005 oral argument***. *See supra* n.5. As a result, there was no need for Marine Forests to raise the above defenses and Marine Forests was denied the opportunity to be heard on this matter.

B. The De Facto Officer Doctrine Only Applies to Otherwise Lawful Actions

The California Supreme Court's April 9, 2003 Order, App. E at 131, required Marine Forests to address the issues of retroactivity, the constitutionality of the February 20, 2003 California Legislature's corrective legislation, and remedies. None of these issues involved Marine Forests because it had filed a timely action prior to the effective date of the corrective legislation. App. B at 90. Instead, Marine Forests was forced to represent the interests of all California coastal property owners not currently before the court and who were not clients of Marine Forests' attorneys. In that capacity, the supreme

court placed emphasis on the rights of third parties rather than addressing the rights of Marine Forests, especially at oral argument. As a result, the court determined that those third parties had no rights and included Marine Forests in its analysis even though many of the main issues had never been presented nor did they apply. Even more detrimental to Marine Forests was the court's inadequate analysis of the separation of powers issue – the actual issue on appeal. Consequently, the court denied Marine Forests due process.

For example, the Court in its decision challenged Marine Forests' argument that the de facto officer doctrine should not apply to actions by the Coastal Commission when it is determined that the Commission also violated other constitutional rights of parties before the Commission. App. A at 74. The court cited *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987). There, the Coastal Commission was demanding the dedication of private property to the state in return for granting permits. The United States Supreme Court held that this practice "was an out-and-out plan of extortion" and was unconstitutional. *Nollan*, 483 U.S. at 837, 107 S. Ct. at 3149.

The California Supreme Court responded by stating: "But Marine Forests fails to cite any California authority supporting the imposition of such a limitation on the de facto officer doctrine, a limitation that largely would eviscerate the doctrine and that finds no support in its underlying purpose." App. A at 74.

The court then makes the contradictory statement: "Of course, if a past action of the Commission remains subject to judicial review and is vulnerable to challenge on

some other ground, the de facto officer doctrine will not provide a bar to such a challenge." App. A at 74.

The court also improperly relies on this Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 142, 96 S. Ct. 612, 693 (1976). App. A at 73. In *Buckley*, the Federal Elections Commission, which administers federal election law, was found to violate the separation of powers doctrine because four of the six voting members of the commission were appointed by members of Congress. Their past actions were afforded de facto validity and Congress was allowed 30 days to reconstruct the Commission by law or adopt other valid enforcement mechanisms.

The difference in *Marine Forests* is that the Coastal Commission was not unlawful and neither were the commissioners. The trial court and court of appeal held that the Commission could continue to perform legislative acts but not judicial or executive acts unless the legislature corrected matters. As a legislative body, the Commission could continue to set statewide policy and make rules, but not implement them. This also would avoid the constitutional flaw of the Commission, which results in legislative interference with its implementation of the Coastal Act. Marine Forests contends that this legislative intrusion results in favoritism, lack of consistency, uncertainty and other such matters.

The remedy was well within the discretion of the trial court and the court of appeal as the Commission would remain in existence. If the legislature did not like this solution, it could pass corrective legislation, which in the court's opinion, it had. In reality, who could the attorney general sue under quo warranto? It could not sue its

clients, the Coastal Commission and commissioners, because they all held lawful office.

C. While Injunctions Are Normally Prospective, the Prior Law Still Controls Former Unlawful Acts Under Marine Forests' Facts

In its decision, the California Supreme Court declares:

> [T]he validity of the judgment must be determined on the basis of the current statutory provisions, rather than on the basis of the statutory provisions that were in effect at the time the injunction order was entered. . . .
>
> . . .
>
> Accordingly, in resolving this appeal from the trial court's judgment granting injunctive relief against the Coastal Commission, we must determine whether the injunction should be affirmed in light of the current statutory provisions. If the current statutory provisions are constitutional, the injunction prohibiting the Commission from granting, denying, or conditioning permits ***in the future*** (or from holding hearings on and determining cease and desist orders) cannot be upheld on appeal.

App. A at 18-20 (emphasis added).

Here, both the trial and appellate courts enjoined the Commission from performing executive and judicial branch functions. The California Supreme Court ruled that AB1X was constitutional and that the Commission's past adjudicatory and executive actions involving Marine Forests as to decisions rendered prior to the effective date of the new legislation were valid. "Retroactive application of a statute may be unconstitutional if it is an ex post facto law,

if it impairs the obligation of a contract ***or if it deprives a person of a substantive right without due process of law.*** *Plotkin v. Sajahtera, Inc.*, 106 Cal. App. 4th 953, 962, 131 Cal. Rptr. 2d 303 (2003) (emphasis added); *see also In re Marriage of Buol*, 39 Cal. 3d 751, 756, 705 P.2d 354 (1985). Assuming *arguendo* that AB1X remedied the problems articulated by both the trial and appellate courts, the past cease and desist decision involved in this lawsuit which was made by the former unconstitutional agency remains invalid and unenforceable as to the Marine Forests Society. In fact, it is clear that the legislature did not intend retroactivity as there was no intent expressed to do so. A statute is normally presumed not to be retroactive. *Plotkin*, 106 Cal. App. 4th at 961-62, 131 Cal. Rptr. 2d 303.

Due process prohibits any application of the former unconstitutional agency's actions such as the issuance of the cease and desist order. The new law cannot retroactively apply to adjudicatory actions of a former unconstitutional agency. The parties appearing before the old agency have not had a hearing before a constitutional body; therefore, the past decisions can have no effect. Those parties can be affected only by future agency actions taken by the newly constituted agency. This argument was presented in greater detail in Marine Forests' January 14, 2005 Supplemental Letter Brief before the California Supreme Court beginning at page 1.

Based on the above, the additional barriers fail and do not moot out the Marine Forests' separation of powers action. In view of the California court's apparent disdain for the previous "at will" appointment scheme, App. A at 61 and 67, the court should have ruled on this issue and recognized that the prior injunction was effective during the time the old law was in effect. These are further

examples of the California Supreme Court abruptly changing the law without warning or precedental support.

D. The California Coastal Act Provides No Safeguards to Protect Against the Intrusion of the Legislative Branch of Government

Petitioners were able to establish the complete absence of safeguards to protect the executive branch's core functions from undue interference by the legislature, that is implementing the laws including the Coastal Act. The lower courts agreed. App. B at 101-104. The California Supreme Court's contrary conclusion on this subject further illustrates its pretextual approach. App. A at 62-63.

In fact, the Attorney General did not present argument on this issue until his last minute of rebuttal during oral argument before the California Supreme Court. DVD at 1:04:00.[6] While the California Supreme Court ruled that

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[6] At the end of his rebuttal before the California Supreme Court, counsel for the Commission stated: "The Commissioners are independent. They don't have unfettered discretion to follow the whims of their appointing authority. They have a Coastal Act to follow. Their decisions have to be based on evidence. They have to be conducted at a public hearing. Findings have to be made. There has to be written findings. Those findings have to be supported by evidence and all that gets reviewed by the courts, and so we have – if they are going to do what they have been asked to do, what they have sworn to do, they are going to follow the law and they are going to disregard any perceived displeasure of their appointing authority. Even assuming they can devise in any case what their appointing authority wanted them to do. So, I think the court has a choice then, if you get to this removal issue, are we going to presume the best in the people that we have appointed to do the job or are we going to presume that they are going to disregard all these safeguards and act simply to please their appointing authority?"

there were plenty of safeguards, App. A at 62-63, the proffered safeguards were due process safeguards not separation of powers safeguards. *See* App. B at 101-104 and *O'Brien v. Jones*, 23 Cal. 4th 40, 54-56, 999 P.2d 95 (2000) for comparison to due process safeguards.

Thus, the California Supreme Court's pretextual approach failed to substantiate its conclusion regarding safeguards and further denied due process for Marine Forests.

CONCLUSION

The de facto officer doctrine has been limited under California law to defects in the title to office. In this separation of powers action, the California Supreme Court suddenly and arbitrarily changed California law to apply this doctrine to a separation of powers challenge. This was unpredictable in terms of relevant precedents and is inconsistent with the law of all other states and the federal government. As a result, the Marine Forests Society is being deprived of its property interests in its marine habitat that its 19-year effort has established. Because of the California Supreme Court's decision, the state will accomplish this taking without payment of just compensation and without due process of law. This is such a departure from the accepted and usual course of judicial proceedings that a federal issue has arisen and the exercise of this Court's review power is necessary.

The importance of California's and our country's separation of powers doctrines emanated from the efforts of our founding fathers and was thoroughly addressed in the federalist papers. *O'Brien v. Jones*, 23 Cal. 4th at 65-66, 999

P.2d 95. The California Supreme Court has now made it impractical if not impossible in California to mount a separation of powers challenge as has been attempted by Marine Forests.

The Marine Forests Society has experienced extensive denials of due process and has been subjected to a judicial taking of its property. A state is precluded from taking private property without due process and the payment of just compensation – the courts should not be the exception.

This deprivation of Marine Forests' constitutional rights includes the following:

1. The California Supreme Court has allowed a state agency to take the subject Marine Forests' property without just compensation or due process of law;

2. The concept that injunctive relief is prospective cannot apply to adjudicatory functions of a formerly unconstitutional agency action without denying due process of law.

3. The parties appearing before the old agency have not had a hearing before a constitutional body and therefore have been denied due process.

4. Marine Forests was denied a hearing before the trial court and court of appeal on the de facto officer and quo warranto doctrines as they were raised for the first time before the California Supreme Court. These issues were never raised or orally argued in the context of applying to Marine Forests, thus again denying due process.

5. Whether a state court has unpredictably changed state law to deny constitutional rights presents a federal question for the determination of this Court.

6. Petitioners have demonstrated that the basis for the California Supreme Court's decision and reasoning was pretextual raising a due process issue.

7. A further example of the pretextual approach by the California Supreme Court was the suggestion that there were plenty of separation of power safeguards present when there actually was a total absence of such safeguards as found by the lower courts.

8. The California Supreme Court erred by incorrectly applying the de facto officer doctrine which had previously been applied only where there was a defect in the appointment of a public official.

9. Due process of law was denied by the California Supreme Court in requiring two actions to be brought. This issue was waived by the attorney general and in fact, had been complied with. *See supra* n.25.

10. The failure to raise or address the separate proceeding issue at the trial and appellate levels, including oral argument, is a denial of due process. This subject first appeared in the June 23, 2005 decision of the California Supreme Court. App. A at 70.

11. There has been a denial of access to the courts caused by the California Supreme Court not reaching the issue of the constitutionality of

the structure of the Coastal Commission prior to May 20, 2003. That was the primary issue on appeal that involved the Marine Forests Society.

12. As a result of the California Supreme Court's decision, petitioners have been denied fundamental fairness and have been deprived of fundamental constitutional rights.

For the reasons set forth above, petitioners respectfully request that this Court grant the Petition for Writ of Certiorari and direct the California Supreme Court to address the issue of the constitutionality of the prior statutory scheme and, if found to be unconstitutional, grant declaratory or other appropriate relief or remand the case to a lower court.

DATED: September 20, 2005.

Respectfully submitted,

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INDEX TO APPENDIX

APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA

MARINE FORESTS SOCIETY et al.,	S113466
Plaintiffs and Respondents,	Ct.App. 3 C038753
v.	Sacramento County Super. Ct. No. 00AS00567
CALIFORNIA COASTAL COMMISSION et al.,	(Filed 6/23/05)
Defendants and Appellants.	

This case involves a constitutional challenge to the provisions of the California Coastal Act (Coastal Act or Act) governing the appointment and tenure of the members of the California Coastal Commission (Coastal Commission or Commission). At the time this action was commenced, the applicable statutes provided, in part, that one-third of the voting members of the Coastal Commission were to be appointed by the Governor, one-third by the Senate Committee on Rules (Senate Rules Committee), and one-third by the Speaker of the Assembly, and further provided that all members of the Commission were to serve a two-year term and were eligible for reappointment for succeeding two-year terms but were removable throughout their term in office at the pleasure of their appointing authority. (Pub. Resources Code, § 30301, subds. (e), (f), former § 30312, subd. (b), as enacted by Stats. 1976, ch. 1330, § 1, p. 5970.)[1] In their initial cause of action, plaintiffs asserted that this statutory structure – by authorizing members of the legislative branch to

[1] Unless otherwise indicated, all further statutory references are to the Public Resources Code.

appoint a majority of the voting members of the Commission and enabling each appointing authority to remove its appointees at will – rendered the Coastal Commission a "legislative body" for purposes of the separation of powers clause of the California Constitution and that such a body was precluded from engaging in executive or judicial functions, such as granting, denying, or conditioning a development permit, or hearing and determining a cease and desist order. The complaint sought declaratory and injunctive relief, including an order enjoining the Commission from engaging in the foregoing executive or judicial functions in the future.

The trial court granted summary adjudication in favor of plaintiffs on the separation of powers cause of action, and issued the requested injunctive relief, enjoining the Coastal Commission from granting, denying, or conditioning permits or issuing and hearing cease and desist orders. On appeal, the Court of Appeal affirmed the judgment rendered by the trial court, declaring that the statutory scheme was flawed in authorizing the Senate Rules Committee and the Speaker of the Assembly to remove a majority of the voting members of the Commission at will, because such a structure created an improper subservience on the part of the Commission to the legislative branch.

In response to the Court of Appeal's decision, and while the Coastal Commission's petition for review from that decision was pending in this court, the Legislature enacted, and the Governor signed, an urgency measure amending the pertinent provisions of the Coastal Act. (Stats. 2003-2004, 2d Ex. Sess. 2003, ch. 1x, enacted Feb. 20, 2003, eff. May 20, 2003.) As amended, the statutory scheme continues to provide for appointment of one-third

of the voting members of the Commission by the Governor, one-third by the Senate Rules Committee, and one-third by the Speaker of the Assembly, but now provides that each of the commission members appointed by the Senate Rules Committee or by the Speaker of the Assembly shall serve a four-year term and is not removable at the pleasure of such member's appointing authority. (§§ 30301, subds. (e), (f), 30312, subds.(a)(2), (b)(2).) Each member appointed by the Governor, by contrast, continues to serve a two-year term and may be removed at the pleasure of the Governor. (§ 30312, subds. (a)(1), (b)(1).)

Although both parties initially focused the bulk of their briefing on the question of the validity of the statutory scheme in effect at the time this action was initiated, as we shall explain the governing authorities establish that the resolution of this appeal actually turns on the validity of the current statutory scheme. Under the controlling precedent, it is well established that when, as here, a judgment for injunctive relief is reviewed on appeal, the validity of the injunction is governed by the law in effect at the time the appellate court renders its decision. Because the statutory provisions upon which the decisions of the trial court and the Court of Appeal were based have been modified, our determination of the validity of the judgment granting injunctive relief necessarily rests upon an assessment of the validity of the revised statutory scheme as it presently exists.

For the reasons discussed below, we conclude that the current statutory provisions governing the composition of the Coastal Commission do not violate the separation of powers clause of the California Constitution. As we shall see, although plaintiffs' challenge to the current provisions relies heavily on a number of United States Supreme

Court decisions holding that, under the separation of powers doctrine embodied in the federal Constitution, Congress has no authority to appoint an executive officer (see, e.g., *Buckley v. Valeo* (1976) 424 U.S. 1, 135-136; *Myers v. United States* (1926) 272 U.S. 52, 117), it is clear both from the history of the California Constitution and from the judicial authorities interpreting the separation of powers clause of our state Constitution, that the California Constitution, unlike the United States Constitution, does not categorically preclude the Legislature from enacting a statutory provision authorizing the Legislature itself to appoint a member or members of an executive commission or board.

At the same time – and contrary to the argument advanced in this case by the Attorney General – we conclude that, as in other contexts in which one branch's actions potentially impinge upon the domain of a coordinate branch, the separation of powers clause of the California Constitution imposes limits upon the legislative appointment of executive officers. Consistently with past decisions that have addressed allegedly improper legislative intrusion upon the functions of the judicial branch, we conclude that the California separation of powers clause precludes the adoption of a statutory scheme authorizing the legislative appointment of an executive officer or officers whenever the statutory provisions as a whole, viewed from a realistic and practical perspective, operate to defeat or materially impair the executive branch's exercise of its constitutional functions. As we shall explain, a statute authorizing the legislative appointment of an executive officer may transgress this constitutional limitation in at least two distinct circumstances. First, such a statute would violate the separation of powers clause if

legislative appointment to the particular office in question intrudes upon what might be characterized as the "core zone" of the executive functions of the Governor (or another constitutionally prescribed executive officer), impeding that official from exercising the independent discretion contemplated by the Constitution in the performance of his or her essential executive duties. Second, a statute providing for the legislative appointment of an executive officer also would violate the separation of powers clause if the statutory scheme, taken as a whole, permits the legislative appointing authority to retain undue control over an appointee's executive actions, compromising the ability of the appointed officer (or of the executive body on which the appointee serves) to perform the officer's (or the executive body's) authorized executive functions independently, without legislative coercion or interference.

After reviewing the current provisions of the Coastal Act under the foregoing standard, we conclude that in light of the nature of the Coastal Commission's functions, the origin, purpose, and operative effect of the Commission's current appointment and tenure structure, and the numerous safeguards incorporated within the Coastal Act that serve to ensure that the actions of commission members adhere to statutory guidelines and are not improperly interfered with or controlled by the legislative appointing authority, the current provisions do not violate the state constitutional separation of powers clause.

Accordingly, because we uphold the constitutionality of the current provisions governing the composition and tenure of the Coastal Commission, we conclude that the judgment rendered by the trial court, enjoining the commission from undertaking the bulk of its statutorily authorized functions, must be reversed.

I

Although the resolution of the legal issue presented by this case does not depend upon the facts underlying the administrative proceeding that generated this constitutional challenge to the composition of the Coastal Commission, to place the controversy in context we briefly set forth the background of the administrative proceeding.

Plaintiff Marine Forests Society (Marine Forests) is a nonprofit corporation whose purpose is the development of an experimental research program for the creation of so-called marine forests to replace lost marine habitat.[3] The organization's objective is to discover economically viable techniques facilitating the creation of large-scale marine forests where seaweed and shellfish growing on sandy ocean bottoms will replace lost marine habitat. As part of its project, Marine Forests began "planting" or depositing various materials, including used tires, plastic jugs, and concrete blocks, on a sandy plain of the ocean off Newport Harbor. The initial project was approved by the City of Newport Beach, the California Department of Fish and Game, and the California Integrated Waste Management Board, but Marine Forests did not seek or obtain permission for its activities from the Coastal Commission.

In June 1993, the staff of the Coastal Commission informed Marine Forests that it was required to apply to the Commission for a permit to conduct its activities on

[3] The complaint was brought in the name of both Marine Forests and Rodolphe Streichenberger, the founder, president, and chief executive officer of Marine Forests. For convenience, we refer to plaintiffs collectively as Marine Forests.

the ocean floor off Newport Harbor. In 1995, Marine Forests applied for an "after-the-fact" permit. In April 1997, the Commission denied Marine Forests' application for the permit and thereafter directed its staff to commence enforcement proceedings against Marine Forests to compel it to cease and desist performing the contested operations. In 1999, the Commission's executive director issued a "Notice of Intent to Commence Cease and Desist Order Proceedings" against Marine Forests.

In response to the issuance of the notice of intent to commence cease and desist proceedings, Marine Forests filed the present proceeding in superior court for declaratory and injunctive relief, seeking to enjoin the Commission from pursuing enforcement proceedings against it. The complaint filed by Marine Forests maintained, in the initial cause of action, that the Coastal Commission lacked authority to pursue enforcement proceedings, asserting that because a majority of the voting members of the Commission were appointed by the Senate Rules Committee and the Speaker of the Assembly and served at the will of their appointing authority, the Coastal Commission must be considered a "legislative body" for purposes of the separation of powers clause of the California Constitution and that the Commission therefore lacked the authority either to grant, deny, or condition a permit (a power the complaint characterized as an "executive power") or to conduct a hearing and issue a cease and desist order (a power the complaint characterized as a "judicial power"). Shortly after the filing of the complaint, both parties moved for summary adjudication on the separation of powers cause of action. The trial court granted summary adjudication in favor of Marine Forests, concluding that the circumstances that a majority of the voting members

of the Commission are appointed by members of the Legislature and that the commission members serve at the pleasure of their appointing authority render the Commission "a legislative body." The trial court held that the Commission, "as a legislative body, is enjoined from exceeding its jurisdiction and violating the Separation of Powers Clause of the California Constitution which precludes it from granting, denying, or conditioning permits or issuing and hearing cease and desist orders."

On appeal, the Court of Appeal affirmed the judgment rendered by the trial court, concluding that "the Commission's interpretation and implementation of the California Coastal Act of 1976 is an executive function, and that the appointment structure giving the Senate Committee on Rules and the Speaker of the Assembly the power not only to appoint a majority of the Commission's voting members but also to remove them at will contravenes the separation of powers clause of California's Constitution. The flaw is that the unfettered power to remove the majority of the Commission's voting members, and to replace them with others, if they act in a manner disfavored by the Senate Committee on Rules and the Speaker of the Assembly makes those Commission members subservient to the Legislature. In a practical sense, this unrestrained power to replace a majority of the Commission's voting members, and the presumed desire of those members to avoid being removed from their positions, allows the legislative branch not only to declare the law but also to control the Commission's execution of the law and exercise of its quasi-judicial powers."

After the Court of Appeal rendered its decision and while the petition for review was pending in this court, the Legislature passed, and the Governor signed, urgency

legislation providing that the members of the Coastal Commission who are appointed by the Senate Rules Committee and by the Speaker of the Assembly shall serve four-year terms and no longer are removable by the appointing authority, rather than serving two-year terms at the pleasure of their appointing authority. The members of the Commission who are appointed by the Governor continue to serve two-year terms at the pleasure of their appointing authority. (Pub. Resources Code, § 30312, as amended by Stats. 2003, 2d Ex. Sess, ch. 1x.)

In light of the importance of the issues raised by this case, we granted review. Our order granting review directed the parties to brief, in addition to the issue set forth in the petition for review relating to the validity of the statutory scheme addressed by the Court of Appeal, the following issues: (1) In light of the February 2003 amendment to the relevant provisions of the Coastal Act, is the composition of the Coastal Commission currently vulnerable to a separation of powers challenge?, and (2) If the Court of Appeal was correct in finding that the pre-2003 Coastal Act provisions relating to the composition and tenure of the Coastal Commission violated the state separation of powers clause, what effect does such a conclusion have upon the past and currently pending decisions of the Coastal Commission?

We have received extensive briefing, both from the parties and from numerous amici curiae in support of each of the parties.

II

The California Coastal Act of 1976 had its origin in an initiative measure, the Coastal Zone Conservation Act

(popularly known as Proposition 20), passed by the voters in the November 1972 general election. The 1972 initiative measure created a statewide California Coastal Zone Conservation Commission and six regional coastal conservation commissions that were charged, among other responsibilities, with the duty of preparing a plan for land use and development within the coastal zone that was to be submitted to the Legislature on or before December 1, 1975. (Former §§ 27300-27320, enacted by Prop. 20, Nov. 7, 1972 Gen. Elec. and repealed by Stats. 1974, ch. 897, § 2, p. 1900, eff. Jan. 1, 1977.) The coastal zone conservation commissions also were granted the authority to issue permits to control development within each region pending the enactment of a statewide plan. (Former §§ 27400-27403.)

As established by the 1972 initiative measure, the statewide commission was composed of 12 members – six representatives from the regional commissions (one selected by each regional commission) and six representatives of the public who were not members of any regional commission and were appointed "equally by the Governor, the Senate Rules Committee, and the Speaker of the Assembly." (Former § 27202, subd. (d), enacted by Prop. 20, Nov. 7, 1972 Gen. Elec. and repealed by Stats. 1974, ch. 897, § 2, p. 1900, eff. Jan. 1, 1977.) The regional commissions were composed of a combination of local elected officials and public representatives. Like the public representatives of the statewide commission, the public representatives of the regional commissions also were appointed equally by the Governor, the Senate Rules Committee, and the Speaker of the Assembly. (*Ibid.*)

While the 1972 initiative measure was in effect, a question arose whether the public members of the regional

and statewide commissions who had been appointed by the Governor, the Senate Rules Committee, and the Speaker of the Assembly had the right to remain in office for the life of the commissions (under the initiative measure, the commissions – as well as the Coastal Zone Conservation Act itself – were to expire on January 1, 1977, when all of the tasks prescribed by the act were required to be completed) or whether all of these members served at the pleasure of their appointing authority. In *Brown v. Superior Court* (1975) 15 Cal.3d 52, this court concluded that the members of the commissions served at the pleasure of their appointing authority, relying on the circumstances (1) that the Coastal Zone Conservation Act contained no provision specifying a term of office for the members of the regional or statewide commissions, and (2) that California law – dating from the California Constitution of 1849 – explicitly has provided that whenever the duration of any office is not provided by law, the office is held at the pleasure of the appointing authority. (Cal. Const. of 1849, art. XI, § 7; Cal. Const. of 1879, art. XX, § 16; Gov. Code, § 1301.) In reaching this conclusion, the court in *Brown* rejected the contention that because the terms of all commission members necessarily would end on January 1, 1977 – when the act would expire – the act properly should be interpreted to grant all commission members a fixed term lasting until January 1, 1977. This court explained that "[n]othing in that limited duration . . . suggests that the drafters or voters intended to confer upon a public representative a term of office equal to the duration of the commission, and thus deny state administrations elected after January of 1973 any role in the selection of those representatives. The drafters and voters could reasonably choose to establish a commission of limited duration, but one composed of politically responsive members subject to

removal by elected officials." (*Brown v. Superior Court, supra*, 15 Cal.3d at p. 56.) In *Brown*, no separation of powers issue was raised or decided.

The commissions created by the 1972 initiative measure completed their work in a timely fashion and submitted a proposed coastal plan to the Legislature in December 1975. The following year the Legislature enacted the California Coastal Act of 1976, a very lengthy and comprehensive statutory scheme aimed at protecting the coastal zone. (§§ 30000-30900.)[3]

The Coastal Act created the Coastal Commission as the entity with the primary responsibility for the implementation of the provisions of the Coastal Act (§ 30330)

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[3] The Coastal Act contains a lengthy series of legislative findings and declarations. (See §§ 30001, 30001.2, 30001.5, 30002, 30004, 30006, 30006.5, 30007.5.)

Section 30001.5 "declares that the basic goals of the state for the coastal zone are to:

"(a) Protect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources.

"(b) Assure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state.

"(c) Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners.

"(d) Assure priority for coastal-dependent and coastal-related development over other development on the coast.

"(e) Encourage state and local initiatives and cooperation in preparing procedures to implement coordinated planning and development for mutually beneficial uses, including educational uses, in the coastal zone."

and designated the Commission "the successor in interest to all remaining obligations, powers, duties, responsibilities, and interests" of the statewide and regional coastal zone conservation commissions established by the 1972 initiative measure. (§ 30331.)

With regard to the selection and tenure of the membership of the Coastal Commission – the issues central to the present proceeding – the Coastal Act set forth detailed provisions governing each of these matters.

The Coastal Act provides that the Coastal Commission consists of 16 members, 12 voting and four nonvoting. (§ 30301.)[4] The 12 voting members of the Coastal Commission consist of "[s]ix representatives of the public from the state at large" and "[s]ix representatives selected from six coastal regions." (§ 30301, subds. (e), (f).)

With regard to the six public members, the Governor, the Senate Rules Committee, and the Speaker of the

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[4] The four nonvoting members of the Coastal Commission are: (1) the Secretary of the Resources Agency, (2) the Secretary of the Business and Transportation Agency, (3) the Secretary of Trade and Commerce, and (4) the Chairperson of the State Lands Commission. (§§ 30301, subds.(a)-(d), 30301.5)

The three agency secretaries are appointed by the Governor (subject to Senate confirmation) and serve at the pleasure of the Governor. (Gov. Code, §§ 12800, 12801.) The State Lands Commission is an entity in the Resources Agency (Gov. Code, § 12805), consisting of the Controller, the Lieutenant Governor, and the Director of Finance (§ 6101), and the Office of Chairperson of the State Lands Commission traditionally has rotated on an annual basis between the Controller and the Lieutenant Governor. (See, e.g., <http://archives.slc.ca.gov/Meeting_Summaries/Current_Meeting/Commission_Meeting_Summaries.htm> [as of June 23, 2005])

Assembly each select two such members. (§ 30301, subd. (e).)[5]

With regard to the six coastal regional representatives, the Governor selects one member from the north coast region (consisting of the Counties of Del Norte, Humboldt, and Mendocino) and one member from the south central coast region (consisting of the Counties of San Luis Obispo, Santa Barbara, and Ventura), the Speaker of the Assembly selects one member from the central coast region (consisting of the Counties of San Mateo, Santa Cruz, and Monterey) and one member from the San Diego coast region (consisting of San Diego County), and the Senate Rules Committee selects one member from the north central coast region (consisting of the Counties of Sonoma and Marin, and the City and County of San Francisco) and one member from the south coast region (consisting of the Counties of Los Angeles and Orange). (§ 30301, subd. (f).) In addition, as to the selection of the regional representatives, the Act provides that the county boards of supervisors and city selection committees within each region shall propose multiple nominees (consisting of county supervisors or city council members who reside in the region) to the appointing authority, and further provides that the appointing authority must make a selection from the nominees proposed by the local governmental entities. (§ 30301.2.)[6]

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[5] Under the Standing Rules of the Senate, the Senate Rules Committee consists of the President Pro Tempore of the Senate, who serves as chair, and four other members of the Senate elected by the Senate.

[6] The Act provides that if the appointing authority notifies the local bodies that none of the first group of nominees is acceptable, the

(Continued on following page)

The Coastal Act, as initially enacted in 1976, provided that any member appointed by the Governor, the Senate Rules Committee, or the Speaker of the Assembly "shall serve for two years at the pleasure of their appointing power" and "may be reappointed for succeeding two-year periods." (Former § 30312, subd. (b), as enacted by Stats. 1976, ch. 1330, § 1, p. 5970.)[7] The Act further specified that "[v]acancies that occur shall be filled ... in the same manner in which the vacating member was selected or appointed." (§ 30313.)[8]

For more than two decades after the creation of the Coastal Commission in 1976, the Commission operated under the foregoing statutory provisions without serious

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appointing authority may request an additional set of nominees. If the appointing authority requests an additional set of nominees, the appointing authority must make the appointment from such nominees. (§ 30301.2, subd. (b).)

[7] The Act further initially provided that although any member who qualified for membership because of the office he or she held as a local elected official generally served at the pleasure of his or her appointing authority, the membership of such an official on the Commission would terminate 60 days after his or her elected term of office ended (or sooner if a replacement was appointed by the appropriate appointing authority).

[8] In addition to the foregoing provisions, the Coastal Act – explicitly recognizing "that the duties, responsibilities, and quasi-judicial actions of the commission are sensitive and extremely important for the well-being of current and future generations[,] and that the public interest and principles of fundamental fairness and due process of law require that the commission conduct its affairs in an open, objective, and impartial manner free of undue influence and the abuse of power and authority" (§ 30320) – included a separate article, entitled Fairness and Due Process (§§ 30320-30329), that precludes commission members from conducting any "ex parte communication" with any person who has a financial interest in any matter before the commission, unless the member fully discloses the communication to the commission on the record of the proceeding.

constitutional challenge. In the present proceeding, however, both the trial court and the Court of Appeal ruled that the foregoing statutory provisions governing the appointment and tenure of commission members violated the separation of powers clause of the California Constitution.

As noted above, in reaching its determination the Court of Appeal explained that in its view "[t]he flaw [in the statutory scheme] is that the unfettered power to remove the majority of the Commission's voting members, and to replace them with others, if they act in a manner disfavored by the Senate Committee on Rules and the Speaker of the Assembly[,] makes those Commission members subservient to the Legislature." Further, the Court of Appeal emphasized that its "legal conclusion – that the process for appointing voting members of the Commission violates the separation of powers doctrine – is limited to the specific facts of this case, where a majority of the Commission's voting members are appointed by the legislative branch and *may be removed at the pleasure of the legislative branch* and there are no safeguards protecting against the Legislature's ability to use this authority to interfere with the Commission members' executive power to execute the laws. We express no opinion regarding the propriety of legislative appointments to administrative agencies under circumstances different than presented here." (Court of Appeal's italics.)

Shortly after the Court of Appeal rendered its decision in this matter, the Legislature passed, and the Governor signed, an urgency measure amending the Coastal Act to provide that members of the Coastal Commission who are appointed or selected by the Senate Rules Committee or by the Speaker of the Assembly shall serve four-year terms

and are not removable at the pleasure of their appointing authority. (§ 30312, subds. (a)(2), (b)(2), as amended by Stats. 2003, 2d Ex.Sess., ch. 1x, § 1.) Under the new legislation, members of the Commission who are appointed by the Governor, by contrast, continue to serve two-year terms at the pleasure of the Governor. (§ 30312, subds. (a)(1), (b)(1).)[9] The revised statute further provides that members appointed by the Senate Rules Committee or by the Speaker of the Assembly may be reappointed for succeeding four-year terms, and members appointed by the Governor may be reappointed for succeeding two-year terms. (§ 30312, subd. (b)(1), (2).)

The parties and amici curiae initially directed the bulk of their briefing to the question whether the statutory provisions governing the appointment and tenure of members of the Coastal Commission that were in effect prior to the 2003 amendments violated the separation of powers clause of the California Constitution. As we shall explain, however, the governing decisions establish that the resolution of the case before us requires us to determine the validity of the *current* statutory provisions, rather than the *prior* provisions in effect at the time of the rulings rendered by the trial court or the Court of Appeal. Accordingly, after discussing the authorities underlying this threshold procedural point, we shall turn to the substantive question whether the current Coastal Act provisions relating to the appointment and tenure of the

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[9] Under the amended statute, as under the prior version, a member of the Commission who qualifies for membership because he or she holds a specified office as a locally elected official ceases to be a member of the Commission 60 days after the termination of his or her term of office as a locally elected official. (§ 30312, subds. (a), (b).)

members of the Coastal Commission violate the separation of powers clause of the California Constitution.

III

As noted, the proceeding before us is an appeal from a judgment granting injunctive relief in favor of Marine Forests. Although Marine Forests earlier had filed an application with the Coastal Commission for an after-the-fact permit and had been denied such a permit, the present proceeding is not an administrative mandate proceeding brought by Marine Forests to contest the permit denial, but rather is a separate action brought by that party to obtain an injunction prohibiting the Coastal Commission from granting, denying, or conditioning permits and from hearing and determining cease and desist orders in the future. As requested by Marine Forests, the trial court granted such injunctive relief on the basis of plaintiff's separation of powers claim, and the Coastal Commission appealed from that judgment. Thus, the question before us on this appeal is the validity of the judgment granting injunctive relief.

With the case in this posture, it is clear under a long and uniform line of California precedents that the validity of the judgment must be determined on the basis of the current statutory provisions, rather than on the basis of the statutory provisions that were in effect at the time the injunctive order was entered. As observed by Witkin: "Because relief by injunction operates in the future, appeals of injunctions are governed by the law in effect at the time the appellate court gives its decision." (6 Witkin, Cal. Procedure (4th ed. 1997) Provisional Remedies, § 399,

p. 324 & cases cited; see also 9 Witkin, Cal. Procedure, *supra*, Appeal, § 332, p. 373.)

The case of *Building Industry Assn. v. City of Oxnard* (1985) 40 Cal.3d 1 provides an apt illustration of this principle. In the *Building Industry* case, after the City of Oxnard enacted an ordinance imposing a "Growth Requirements Capital Fee" on new developments, the plaintiff, an association representing the construction industry, brought an action seeking an injunction against enforcement of the ordinance. The trial court denied injunctive relief and the plaintiff appealed. While the appeal was pending, the city amended the challenged ordinance. On appeal before this court, the plaintiff contended that the modification of the ordinance had no bearing on the resolution of the appeal, but we rejected that contention, explaining that "past California decisions establish that in proceedings of this nature – where injunctive relief against a legislative enactment is sought – the relevant provision for purposes of the appeal is the measure which is in effect at the time the appeal is decided." (40 Cal.3d at p. 3.)

Numerous California decisions have applied this rule. (See, e.g., *Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 306, fn. 6 ["Under settled principles, the version of the ordinance in force at present is the relevant legislation for purposes of this appeal [of an order denying injunctive relief]."]; *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 527-528 ["the rule is well settled that on appeals involving injunction decrees, the law in effect when the appellate court renders its opinion must be applied"].)

Accordingly, in resolving this appeal from the trial court's judgment granting injunctive relief against the

Coastal Commission, we must determine whether the injunction should be affirmed in light of the current statutory provisions. If the current statutory provisions are constitutional, the injunction prohibiting the Commission from granting, denying, or conditioning permits in the future (or from holding hearings on and determining cease and desist orders) cannot be upheld on appeal.

We now turn to the question of the constitutionality of the current Coastal Act provisions under the California separation of powers clause.

IV

Article III, section 3 of the California Constitution – this state's separation of powers clause – provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

In discussing this constitutional provision in *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45 (*County of Mendocino*), we explained: "Although the language of California Constitution article III, section 3, may suggest a sharp demarcation between the operations of the three branches of government, California decisions have long recognized that, in reality, the separation of powers doctrine '"does not mean that the three departments of our government are not in many respects mutually dependent"' [citation], or that the actions of one branch may not significantly affect those of another branch. Indeed, upon brief reflection, the substantial interrelatedness of the three branches' action is apparent and commonplace: the judiciary passes upon the constitutional validity of

legislative and executive actions, the Legislature enacts statutes that govern the procedures and evidentiary rules applicable in judicial and executive proceedings, and the Governor appoints judges and participates in the legislative process through the veto power. Such interrelationship, of course, lies at the heart of the constitutional theory of 'checks and balances' that the separation of powers doctrine is intended to serve." (13 Cal.4th at pp. 52-53.)

In *County of Mendocino*, we continued: "At the same time, [the separation of powers] doctrine unquestionably places limits upon the actions of each branch with respect to the other branches. The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function. [Citation.] The executive branch, in expending public funds, may not disregard legislatively prescribed directives and limits pertaining to the use of such funds. [Citation.] And the Legislature may not undertake to readjudicate controversies that have been litigated in the courts and resolved by final judicial judgment. [Citations.]" (*County of Mendocino, supra,* 13 Cal.4th 45, 53.) As we more recently expressed this point: "The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch." (*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 297.)

In the present case we address a separation of powers challenge to the Coastal Commission. Like many other

modern administrative agencies established by the Legislature, the Coastal Commission is authorized (by the Coastal Act) to perform a variety of governmental functions, some generally characterized as "executive," some "quasi-legislative," and some "quasi-judicial." As a general matter, the Commission performs an "executive" function insofar as it carries out programs and policies established by the Legislature, and the Commission is included for administrative purposes in the Resources Agency, a part of the executive branch. (§ 30300.) The Commission performs a "quasi-legislative" function when it engages in rulemaking through the adoption of regulations (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 168), and a "quasi-judicial" function when it passes upon applications for coastal development permits (*Davis v. California Coastal Zone Conservation Com.* (1976) 57 Cal.App.3d 700, 707), when it reviews the validity of a local government's coastal program (*City of Chula Vista v. Superior Court* (1982) 133 Cal.App.3d 472, 488), and when it issues cease and desist orders with regard to unauthorized development (*Ojavan Investors, Inc. v. California Coastal Com.* (1994) 26 Cal.App.4th 516, 528).

As the Court of Appeal recognized, however, the constitutional propriety of an administrative agency's performance of such varied functions long has been firmly established under California law (see, e.g., *Jersey Maid Milk Products v. Brock* (1939) 13 Cal.2d 620, 658-659; *Gaylord v. City of Pasadena* (1917) 175 Cal. 433, 436-440), and Marine Forests' separation of powers claim does not rest simply upon the varied nature or scope of the governmental authority granted to, and exercised by, the Coastal Commission. Instead, Marine Forests asserts there is a fatal constitutional flaw in the statutory provisions

governing the appointment and tenure of the members of the Commission authorized to perform these varied functions. Marine Forests maintains that because the Commission, in light of its functions, properly must be considered part of the executive branch, the current statutory provisions violate the separation of powers clause embodied in the California Constitution by providing that a majority of the voting members of the Commission are to be appointed by, and are subject to reappointment by, officials or entities that are part of the legislative branch. Although we agree that the Coastal Commission properly is considered part of the executive branch, for the reasons set forth below we do not agree that the challenged statutory provisions governing the appointment and reappointment of Commission members violate the separation of powers clause of the California Constitution.

In support of its separation of powers argument, Marine Forests relies in part upon a number of decisions of the United States Supreme Court interpreting and applying the separation of powers principles embodied in the United States Constitution. In *Buckley v. Valeo, supra,* 424 U.S. 1, 109-143, for example, the high court addressed a constitutional challenge to the provisions of a federal statute governing the appointment of the members of the Federal Election Commission – a body, like the Coastal Commission, charged with a variety of functions similar to those exercised by most contemporary administrative agencies. The statute in question in *Buckley* provided that of the six voting members of the Federal Election Commission, two were to be appointed by the President pro tempore of the United States Senate (upon the recommendations of the majority and minority leaders of the Senate), two by

the Speaker of the United States House of Representatives (upon the recommendations of the majority and minority leaders of the House), and two by the President. The statute further required that each of the six voting members be confirmed by a majority of both houses of Congress and also prohibited each of the three appointing authorities from choosing both of its appointees from the same political party.

In challenging the statute, the plaintiffs in *Buckley* maintained that because the Federal Election Commission was authorized to exercise wide-ranging rulemaking and enforcement powers, "Congress is precluded under the principle of separation of powers from vesting in itself the authority to appoint those who will exercise such authority." (*Buckley v. Valeo, supra,* 424 U.S. 1, 118.) In sustaining the plaintiffs' separation of powers challenge to the federal statutory provisions at issue in that case, the high court in *Buckley* relied principally upon the appointments clause – article II, section 2, clause 2 – of the United States Constitution, concluding that under this provision neither Congress nor its officers could be granted the authority to appoint an officer who is to exercise such executive authority. (424 U.S. at pp. 124-137.) Because the members of the Federal Election Commission had not been appointed in conformity with the requirements of the appointments clause, the court in *Buckley* held that under the federal separation of powers doctrine the commission was precluded from exercising the broad administrative powers that the statute empowered it to perform. (424 U.S. at pp. 137-141.)

The high court's holding in *Buckley* – that under the federal separation of powers doctrine neither Congress nor congressional leaders may be granted the authority to

appoint an executive officer – drew support from a number of prior United States Supreme Court decisions. (See, e.g., *Myers v. United States, supra,* 272 U.S. 52, 117 [the executive power granted the President by article II "included the appointment and removal of executive subordinates"]; *Springer v. Philippine Islands* (1928) 277 U.S. 189, 202 [invalidating Philippine statute that purported to grant executive authority to legislative appointees, observing that "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions."]; *Humphrey's Executor v. United States* (1935) 295 U.S. 602, 624-625 [upholding legislative restrictions upon President's power to remove members of independent regulatory agencies, but recognizing that such executive officers were to be appointed by the President].) In addition, in the years following the high court's decision in *Buckley,* a number of United States Supreme Court decisions have reconfirmed that under federal separation of powers principles the appointment and removal of executive officers are considered executive functions that may not be vested in Congress as a whole or in individual members of Congress. (See, e.g., *Bowsher v. Synar* (1986) 478 U.S. 714 [invaliding [sic] statutory provision that authorized the Controller General, an official subject to removal by Congress, to exercise an executive function]; *MWAA v. CAAN* (1991) 501 U.S. 252 [invalidating statutory provision conferring upon a board of review composed of nine members of Congress the authority to veto executive decisions of the Metropolitan Washington Airports Authority, an executive body].)

Although these federal decisions establish that the provisions of the Coastal Act here at issue would be of doubtful validity if the Coastal Commission were a federal agency and the statutory provisions were to be judged under the federal separation of powers doctrine, the flaw in Marine Forests' reliance upon these federal decisions lies in the implicit assumption that the separation of powers doctrine embodied in the federal Constitution is equivalent to the separation of powers clause of the California Constitution. As we shall see, with respect to the exercise of the particular governmental function at issue in this case – the authority to appoint executive officers – the federal and California Constitutions are quite distinct, rendering inapposite the federal authorities upon which Marine Forests relies.

In the analysis that follows, we begin with a brief overview of several basic differences between the structure of the federal Constitution and that of most state constitutions – differences that explain why, as a general matter, separation of power decisions under the federal Constitution cannot be applied uncritically in resolving separation of powers questions that may arise under a state constitution. We then turn to the specific governmental function at issue in this case – the appointment of executive officers – and explain that although under the federal Constitution Congress is prohibited from appointing any federal executive officers, the California Constitution imposes no similar categorical constraint upon legislative appointment of state executive officers.

Thereafter, we proceed to explain that although the Legislature is not precluded by the state Constitution from providing for legislative appointment of executive officers, the state separation of powers clause imposes limits upon

the Legislature's exercise of this authority, restraining the Legislature from overstepping its bounds by defeating or materially impairing the executive function. Finally, we examine in detail the current provisions of the California Coastal Act relating to the appointment and tenure of the Coastal Commission to determine whether such provisions violate the separation of powers clause of the California Constitution, concluding that these provisions do not violate this clause.

V

In the introduction to a recent scholarly law review article entitled *Interpreting The Separation of Powers in State Constitutions,* Professor G. Alan Tarr observed: "To understand the separation of powers in the American states, one must be willing to explore the nature of state constitutions, their historical development, and their underlying ideas, without preconceptions derived from familiarity with the separation of powers on the national level. . . . The most cursory examination of state constitutions confirms how distinctive state constitutions and governments are. The Federal Constitution restricts the federal government both by imposing prohibitions on the government and by granting the government only limited powers. Under state constitutions, by contrast, the second restriction is largely missing, and thus the states exercise plenary legislative power. . . . [¶] Put differently, despite the superficial similarities, state governments are not merely miniature versions of the national government." (Tarr, *Interpreting The Separation of Powers in State Constitutions* (2003) 59 N.Y.U. Ann. Surv. Am. L. 329, 329-330 (hereafter Tarr).)

As Professor Tarr goes on to explain, "both federal and state constitutions agree with Montesquieu in positing three branches of government – legislative, executive, and judicial – each invested with a different function. The institutions created at the national and state levels also have a surface similarity: state legislature and Congress, governor and president, state supreme court and U.S. Supreme Court. But when one proceeds below the surface, one finds that those apparently analogous structures of government and separation of powers quickly evaporate." (Tarr, *supra,* at p. 333.) With regard to the federal Constitution, "[t]he major concern in 1787 was to introduce checks on the legislative branch which, as James Madison warned in Federalist No. 51, 'necessarily predominates' in republican governments." (*Ibid.*) On the other hand, "[m]ost early state constitutions reflected a quite different sensibility. Typically the separation of powers was not designed to balance power among the branches of government. Power tended to be concentrated in the legislature, in most instances the only branch whose members were directly elected by the people; to state constitution-makers this seemed altogether appropriate." (*Id.* at p. 334.)

Of course, these cautionary admonitions do not mean that federal separation of powers decisions never provide helpful guidance in interpreting the California separation of powers clause. In the past, we have looked to federal decisions for assistance in interpreting our state constitutional separation of powers doctrine in instances in which there were no fundamental differences between the relevant constitutional provisions. (See, e.g., *Carmel Valley Fire Protection Dist. v. State of California, supra,* 25 Cal.4th 287, 298-308.) The appropriateness of such reliance, however, necessarily depends upon the nature of the

particular separation of powers question that is at issue in a given case. The general teaching of the article quoted above is simply that in interpreting and applying a state constitutional separation of powers provision, a court must keep in mind potential structural differences between the state and federal constitutions. As Professor Tarr observes, "[i]n interpreting state constitutions, one must ... not assume that the definition of what is 'executive' or 'legislative' is the same at the state level as at the national level." (Tarr, *supra*, at p. 338.)

VI

The separation of powers issue presented in this case concerns the authority to appoint a public official who performs an executive function. The Framers of the federal Constitution, in large part in reaction to the failures that occurred under the Articles of Confederation, opted to establish a strong, unitary executive officer – the President – with extensive executive authority. (See The Federalist Nos. 69, 70 (Alexander Hamilton).) One important feature of the decision to create a strong executive was the adoption of the federal appointments clause – article II, section 2, clause 2 of the United States Constitution[10] – which grants the President the exclusive appointment authority over high executive officials, and authorizes

[10] Article II, section 2, clause 2 of the United States Constitution provides: "[The President] ... by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

Congress, by statute, to vest the appointment of "inferior officers" "in the President alone, in the courts of law, or in the heads of departments," but pointedly does *not* authorize Congress *itself* to appoint *any* executive official. (See, e.g., *Buckley v. Valeo, supra*, 424 U.S. 1, 124-136.) In light of the language and history of the appointments clause, the United States Supreme Court has held that under the federal separation of powers doctrine, neither Congress as a whole, nor congressional leaders, may appoint a federal executive officer. (*Ibid.*)

The United States Supreme Court also has made clear, however, that the separation of powers doctrine embodied in the federal Constitution, which governs the allocation and exercise of governmental authority by the federal legislative, executive, and judicial branches, has no application to the states. As the high court observed in *Mayor of Philadelphia v. Educ. Equal. League* (1974) 415 U.S. 605, 615, footnote 13: "The [federal] Constitution does not impose on the States any particular plan for the distribution of governmental powers." (See also *Dreyer v. Illinois* (1902) 187 U.S. 71, 84.)

Accordingly, the separation of powers issue before us must be decided on the basis of the California Constitution.

VII

Unlike the federal Constitution, the California Constitution – like many state constitutions – embodies a structure of divided executive power, providing for the statewide election of not only the Governor (and the Lieutenant Governor), but also of the Attorney General, the State Treasurer, the Secretary of State, the Controller,

and the Superintendent of Public Instruction.[11] Furthermore, and perhaps most significantly, unlike the United States Congress, which possesses only those specific powers delegated to it by the federal Constitution, it is well established that the California Legislature possesses *plenary* legislative authority except as specifically limited by the California Constitution. (See, e.g., *Fitts v. Superior Court* (1936) 6 Cal.2d 230, 234 ["we do not look to [the California] Constitution to determine whether the [L]egislature is authorized to do an act, but only to see if it is prohibited. In other words, unless restrained by constitutional provision, the [L]egislature is vested with the whole of the legislative power of the state."]; *California Housing Finance Agency v. Patitucci* (1978) 22 Cal.3d 171, 175 [same]; see also *People v. Tilton* (1869) 37 Cal. 614, 626 [" . . . State Constitutions are not grants of power to the Legislature. Full power exists when there is no limitation"].)

In contrast to the federal Constitution, there is nothing in the California Constitution that grants the Governor (or any other executive official) the exclusive or paramount authority to appoint all executive officials or that prohibits the Legislature from exercising such authority. Moreover, as we shall see, the history of the California Constitution and past judicial decisions make it abundantly clear that under this state's Constitution the Legislature possesses authority not only to determine

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[11] Provision for the statewide election of the Insurance Commissioner is statutory, rather than constitutional. (See Ins. Code, § 12900; cf. Cal. Const., art. V, §§ 2 (Governor), 11 (Lieutenant Governor, Attorney General, Controller, Secretary of State, and Treasurer), art. IX, § 2 (Superintendent of Public Instruction).)

whether to create new executive offices, agencies, or commissions, but also to decide who is to appoint such executive officers and commissioners, including, at least as a general matter, the authority to provide for such appointment by the Legislature itself.

We begin with the relevant provisions of California's first Constitution – the Constitution of 1849.

A

The 1849 Constitution contained two explicit provisions relating specifically to the appointment of executive officials.

Article XI, section 6, of the 1849 Constitution provided: "All officers whose election or appointment is not provided for by this Constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed *as the Legislature may direct.*" (Italics added.)

Article V, section 8, of the 1849 Constitution provided: "When any office shall, from any cause become vacant, *and no mode is provided by the Constitution and laws for filling such vacancy,* the Governor shall have the power to fill such vacancy by granting a commission, which shall expire at the end of the next session of the Legislature, or at the next election by the people." (Italics added.)

Thus, the 1849 Constitution established that, except as otherwise provided by the Constitution, the Legislature possessed the constitutional authority to determine the method for appointing executive officers, and that the Governor possessed the authority to fill a vacancy in such offices only when no method for filling such vacancies had

been provided by the Constitution or legislation – and then only on an interim basis.

By its terms, article XI, section 6 of the 1849 Constitution provided simply that public officers whose election or appointment was not specified by the Constitution "shall be elected by the people, or appointed as the Legislature shall direct," and did not explicitly address the question whether the provision contemplated that the Legislature could provide for the appointment of public officers by the Legislature itself.[13] Very shortly after the adoption of the Constitution, however, the Legislature made clear by its own contemporary interpretation that it was understood the constitutional provision authorized the Legislature, by legislative enactment, to provide for the appointment of state officers by the Legislature itself.

The second piece of legislation passed by California's first Legislature was a bill creating the Office of State Printer and providing that the State Printer would be elected by the Legislature. (Stats. 1850, ch. 2, p. 45.) Several months later, the Legislature created a four-member Board of Health for the Port of San Francisco,

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[13] The 1849 Constitution contained a provision prohibiting *any member of the Legislature*, during his or her legislative term, from being appointed to "any civil office of profit, under this State, which shall have been created . . . during such term, except such office as may be filled by election by the people" (Cal. Const. of 1849, art. IV, § 20), but contained no provision prohibiting the Legislature from appointing *nonlegislators* to such office. The current California Constitution contains an analogous but somewhat broader provision, prohibiting a state legislator from holding any appointive state office during his or her term of office. (Cal. Const., art. IV, § 13 ["A member of the Legislature may not, during the term for which the member is elected, hold any office or employment under the State other than an elective office."].)

consisting of the Mayor of San Francisco and three additional members appointed by the Legislature. (Stats. 1850, ch. 64, p. 162.) The following year, the Legislature created a State Hospital to be administered by an eight-member board, all of whom were appointed by the Legislature. (Stats. 1851, ch. 127, p. 500.)

Very early decisions of this court confirmed both the primacy of the Legislature's constitutional role in determining how and by whom executive officers should be appointed, and the very limited nature of the role that the state Constitution granted to the Governor with regard to this function. (See, e.g., *People v. Fitch* (1851) 1 Cal. 519, 536; *People v. Jewett* (1856) 6 Cal. 291, 293.) In *People v. Mizner* (1857) 7 Cal. 519, 524-525, this court, after reviewing the applicable state constitutional provisions quoted above, declared in this regard: "It would seem that the evident intent and whole spirit of the Constitution of the State *was to limit the patronage of the Executive within very narrow bounds.*" (Italics added; see also *People v. Tilton, supra,* 37 Cal. 614, 622 ["'Our Constitution, whether wisely or unwisely, it is not our province to determine, has studiously restricted the patronage of the Governor.'"].)[12] Although the Constitution of 1849, like the Constitution today, included provisions specifying that

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[12] As these early decisions noted, other provisions of the 1849 Constitution were consistent with this approach. This Constitution provided that all of the statewide constitutional officers would be selected by election by the people, but also provided that prior to the initial election, the Legislature would appoint the first Attorney General, Treasurer, Comptroller, and Surveyor General, as well as the first justices of the Supreme Court (*id.*, art. V, § 20; art. VI, § 3); the Governor was given the authority to appoint, with the advice and consent of the Senate, only the first Secretary of State (*id.*, art. V, § 19).

"[t]he supreme executive power of this State shall be vested in . . . the Governor" and that "[the Governor] shall see that the laws are faithfully executed" (Const. of 1849, art. V, §§ 1, 7 [see now Cal. Const., art. V, § 1]), none of the numerous authorities cited above suggested that these provisions could be interpreted to grant the Governor a broad power to appoint executive officers in the absence of statutory authorization, in part because of the specific constitutional provision that expressly granted the Governor only a limited authority to fill vacancies in such offices. (Cal. Const. of 1849, art. V, § 8.)[14]

With regard to the separation of powers question before us today, the most directly relevant of the early California decisions is *People v. Langdon* (1857) 8 Cal. 1. In *Langdon*, a dispute arose with regard to who properly held the public office of superintendent of the state asylum for the insane – the person who had been appointed by the Governor to a vacancy in the position, or the person

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[14] In *McCauley v. Brooks* (1860) 16 Cal. 1, 40, the court, in listing a number of important functions or duties as to which the Governor, as head of the executive branch, has broad discretion that generally is not subject to judicial review, noted in dictum that the Governor "can exercise his discretion in numerous appointments to office." Nothing in *McCauley*, however, indicates that the appointments to which this brief passage refers were other than appointments to the numerous offices that the Governor was authorized to fill either by virtue of the constitutional provision relating to vacancies, or the numerous then-existing statutes providing for gubernatorial appointment. Unlike the cases discussed in text above, *McCauley* itself did not involve an issue relating to an appointment to office, but rather concerned the unrelated procedural question whether a writ of mandamus could be issued to compel the Controller to perform a ministerial act – in that case, the issuance of a warrant for a sum due from the state that was payable from available, appropriated funds. On this procedural point, the court in *McCauley* held that a writ of mandamus could issue to compel this type of ministerial act by an executive officer.

subsequently appointed by the Legislature. The governing statute provided that the superintendent was to be appointed for a two-year term by a vote of the Legislature on joint-ballot, but the Governor's appointee (who had been appointed to fill a vacancy) challenged the applicable statute as a violation of the state separation of powers clause, arguing that "[t]o create the office, prescribe the duration of the term, and to define the powers and duties of the office are clearly legislative functions, but to fill this office by an election in joint convention is not a legislative function. It is most clearly an invasion of the executive power of the State, or the rights of the people to elect." (8 Cal. at p. 4.)

Restating and responding to this argument, the court in *Langdon* observed: "The appellant contends that, under the third article [separation of powers] and the sixth section of the eleventh article of the Constitution [election or appointment of officers], the Legislature have [sic] no power to elect an incumbent to an office. The third article provides for the distribution of the powers of government between the executive, legislative, and judicial branches of government, and forbids those charged with duties belonging to one, from exercising functions appertaining to another department.[10] Under this provision, it is urged that the Legislature may create the office, but cannot elect

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[10] The language of the separation of powers provision of the 1849 Constitution was similar to the current provision, and read in full: "The Powers of the Government of the State of California shall be divided into three departments: the Legislative, the Executive, and Judicial; and no person charged with the exercise of powers belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases hereinafter expressly directed or permitted." (Cal. Const. of 1849, art. III.)

the officer; that it would be exercising power belonging to the executive branch of the government, or to the people. Unhappily for the argument, there is no fourth branch of the government recognized by the third article of the Constitution, which is represented by the people, and if there is any encroachment upon any other department, it must be upon the Executive." (*People v. Langdon, supra*, 8 Cal. 1, 15-16.)

The court in *Langdon* then explained: "The power to fill an office is political, and this power is exercised in common by the Legislatures, the Governors, and other executive officers, of every State in the Union, unless it has been expressly withdrawn, by the organic law of the State. That it has not been by our Constitution, there can be no doubt: First, because there is no clause that would warrant such a construction: and, Second, because there are several that would forbid it." (*People v. Langdon, supra*, 8 Cal. 1, 16.)

After reviewing the language of article XI, section 6 of the 1849 Constitution – that all officers whose election or appointment is not provided by the Constitution "shall be elected by the people, or appointed, *as the Legislature may direct*" (italics added) – and rejecting as specious the claim that the use of the term "appointed" prohibited the Legislature from providing for the selection of an officer through "election" by the members of the Legislature (rather than by "appointment" by the Legislature), the court in *Langdon* declared emphatically: "It would be useless to pursue this argument further; *this power has been always exercised by the Legislature, and never before denied. It is not prohibited by the Constitution, and according to the theory and spirit of our institutions, is safer when exercised by the immediate representatives of the*

people, than when lodged in the hands of the Executive." (*People v. Langdon, supra,* 8 Cal. 1, 16, italics added.)

Subsequent cases decided under the 1849 Constitution reiterated the principles set forth in the early cases, confirming the Legislature's broad authority over the appointment of executive officers, including the power to authorize the appointment of such officers by the Legislature itself. (See, e.g., *Wetherbee v. Cazneau* (1862) 20 Cal. 503, 508; *People v. Tilton, supra,* 37 Cal. 614, 621-623; *In re Bulger* (1873) 45 Cal. 553, 559.)[16]

In 1872, as part of the adoption of the initial Political Code, the Legislature enacted a general statute providing that, in the absence of a specific statute prescribing the appointing authority for a particular office, the officer would be appointed by the Governor. (Pol. Code of 1872, § 875 ["Every officer, the mode of whose appointment is not prescribed by the Constitution or statutes, must be appointed by the Governor"].) This provision – whose

[16] The 1849 Constitution of California was hardly alone in recognizing the Legislature's authority to appoint executive officers. In The Federalist No. 47, James Madison reviewed the structure of a number of the state constitutions that were in existence at the time of the drafting of the federal Constitution in 1787, and noted that the constitutions of at least seven of the original colonies (New Hampshire, Massachusetts, New York, Delaware, Virginia, South Carolina, and Georgia) provided for the appointment of at least some executive officers by the Legislature itself, including, in a number of instances, the state governor. (The Federalist No. 47, at pp. 303-307 (James Madison) (Clinton Rossiter ed. 1961).) Although Madison objected to the legislative appointment of executive officers and was instrumental in persuading the drafters of the federal Constitution to incorporate a different structure into the federal Constitution, the drafters of the 1849 Constitution of California opted, in this instance, to model the relevant provisions of the California Constitution on the earlier state models.

terms are now embodied in nearly identical language in Government Code section 1300[17] – recognizes that the Legislature retains the authority to determine the mode of appointment of state officers by the enactment of an applicable statute, but in the absence of such an enactment the Governor is statutorily empowered to appoint the officer.

B

Thirty years after the adoption of the 1849 Constitution, a constitutional convention was convened in California to draft a new Constitution.

During the 1878-1879 Constitutional Convention, two delegates proposed the adoption of revised constitutional provisions that would have conferred upon the Governor the general authority to appoint state executive officers and would have prohibited the Legislature itself from appointing such officers. (See 1 Willis & Stockton, Debates and Proceedings, Cal. Const. Convention 1878-1879, p. 147 [amendment proposed by Mr. White: "The Governor shall nominate, and by and with the advice and consent of the Senate . . . appoint all officers whose offices . . . may be created by law, and whose appointment or election is not otherwise provided for; *and no such officer shall be appointed or elected by the Legislature, or by any legislative enactment.*" (Italics added.)]; *id.* at p. 177 [amendment proposed by Mr. Dudley: "All officers whose election or appointment is not provided for by this Constitution, and

[17] Government Code section 1300 provides: "Every officer, the mode of whose appointment is not prescribed by law, shall be appointed by the Governor."

all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the Legislature may direct. All appointed officers of the State Government must be appointed by the Governor [with specified exceptions]. . . . *No office shall be filled by appointment of the Legislature, or either branch thereof, save the offices of its own body.*" (Italics added.)].) Neither of the proposed revisions, however, was adopted by the convention, and instead the convention adopted constitutional provisions that, in all relevant respects, paralleled the earlier provisions of the 1849 Constitution.[18]

Ten years after the adoption of the 1879 Constitution, a separation of powers claim similar to that before us today came before this court in *People v. Freeman* (1889) 80 Cal. 233. *Freeman* was an action instituted by the Governor, seeking to oust a member of the state library board of trustees on the ground that the applicable statutory provision that granted the Legislature the power to appoint (for a four-year term) all five members of the library board was unconstitutional under the separation of powers doctrine. In *Freeman*, the Governor contended that "appointing to office is intrinsically, essentially, and exclusively an executive function, and therefore cannot be

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[18] The subject formerly set forth in article XI, section 6 of the 1849 Constitution was moved to article XX, section 4 of the 1879 Constitution, which provided in full: "All officers or Commissioners whose election or appointment is not provided by this Constitution, and all officers or Commissioners whose offices or duties may hereafter be created by law, shall be elected by the people, or appointed, as the Legislature may direct."

The provision relating to the Governor's limited power to fill vacancies, formerly set forth in article V, section 8 of the 1849 Constitution, was continued as article V, section 8 of the 1879 Constitution.

exercised by the legislature." (80 Cal. at p. 234.) In support of this claim, the Governor relied upon statements in a few out-of-state decisions and upon a passage from a letter written by Thomas Jefferson, in which Jefferson expressed the view that "'[n]omination to office is an executive function'" and that "'to give it to the legislature . . . is a violation of the principle of the separation of powers. . . .'" (*Id.* at p. 235.)

In *People v. Freeman*, *supra*, 80 Cal. 233, this court, in a unanimous opinion by Chief Justice Beatty, rejected the Governor's contention, explaining: "No doubt these views as to the intrinsic nature of the power of appointment or of nomination to office, and the expediency of confining it to the executive department of the government, are entitled to the highest considerations, but the question here is, not what the constitution ought to be, but what it is, or, in other words, what was the intention of its framers as to this particular matter. Of course if there had been at the time of its adoption a general consensus of opinion in harmony with the views of Mr. Jefferson, as above quoted, we should be forced to conclude that its framers intended to forbid to the legislature the exercise of this power of appointment to office. But there was no such consensus of opinion. On the contrary, it had not only been decided in other states of the Union under constitutions containing provisions substantially equivalent to the sections above quoted from our own, that the legislature could fill offices by itself created, but our own supreme court, construing identical provisions of our old constitution, had come to the same conclusion. (*People v. Langdon*, 8 Cal. at 16.) In view of this construction, so long acquiesced in and acted upon, it must be held that the convention of 1879 in readopting the provisions so construed, in the identical

terms of the old constitution, intended that they should have the same operation and effect formerly attributed to them. If they had meant to prescribe a different rule, it would have been easy to express such intention in language not to be misunderstood, and leaving nothing to construction. [¶] Upon these considerations, we feel constrained to hold that the power of appointment to office, so far as it is not regulated by express provisions of the constitution, may be regulated by law, and if the law so prescribes, may be exercised by the members of the legislature." (*Id.*, at pp. 235-236.)[19]

Accordingly, the decision in *Freeman* reconfirmed that under the California Constitution of 1879, as under the Constitution of 1849, the appointment of executive officers was not an exclusively executive function and that a statute providing for legislative appointment of such officers did not violate the separation of powers provision of the California Constitution. (See also *Ex Parte Gerino* (1904) 143 Cal. 412, 414 ["The legislature has power . . . to declare the manner in which officers other than those provided by the constitution shall be chosen. Such officers may be appointed by the legislature itself, or the duty of appointment may be delegated and imposed upon some other person or body"].)

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[19] Contrary to the assertion of counsel for Marine Forests at oral argument, nothing in the opinion in *Freeman* characterizes the library board at issue in that case as a legislative rather than an executive agency.

C

In 1934, the California Constitution was amended to adopt a new article creating a state civil service system that covered the great bulk of state employees and provided for appointment and promotion of such employees on the basis of competitive examination. (Cal. Const., former art. XXIV, now Cal. Const., art. VII.) Members of boards and commissions – such as the members of the Coastal Commission – however, always have been exempt from the civil service system (Cal. Const., former art. XXIV, § 4, subds. (a), (d), now Cal. Const., art. VII, § 4, subd. (d)), and thus the adoption of the civil service article did not affect the constitutional provisions regarding the appointment of such high state officials.

As a result of the passage of a great variety of initiative measures and legislatively initiated constitutional provisions during the first six decades of the twentieth century, the California Constitution had become a very long and prolix document by the 1960's, and the California Constitution Revision Commission was appointed to undertake a comprehensive review of the California Constitution and propose appropriate revisions. (See Grodin et al., The Cal. State Constitution: A Reference Guide (1993) p. 19.) Upon the recommendations of the California Constitution Revision Commission, the constitutional provision specifically relating to the appointment of executive officers was removed from the Constitution in 1970, but, as we shall see, the historical materials accompanying this change make it clear that this change was not intended to, and did not in fact, alter the state constitutional allocation of power with regard to the appointment of executive officers, such as the members of boards and commissions.

Former article XX, section 4 – the provision of the 1879 Constitution relating to the appointment of executive officers (see, *ante*, p. 36, fn. 18) – was one of a number of constitutional provisions that were repealed by a partial constitutional revision passed at the November 1970 general election. The ballot pamphlet distributed to voters explained that the purpose of the proposed deletions was to place "the subject matter of the deleted provisions . . . under *legislative* control through the enactment of statutes." (Ballot Pamp., Gen. Elec. (Nov. 3, 1970) analysis of Prop. 16 by Legis. Counsel, p. 26, italics added.) Further, the report of the California Constitution Revision Commission that proposed the deletion of this provision from the Constitution explained: "The provision apparently was intended during the early days of statehood to confirm the power of the Legislature to establish departments and agencies other than those specifically created by the Constitution. Since there is nothing elsewhere in the Constitution restricting the now accepted inherent power of the Legislature to establish new offices, agencies, and departments, this provision is constitutionally unnecessary." (Cal. Const. Revision Com., Proposed Revision (1970) p. 36.) At the time of the repeal of former article XX, section 4, Government Code section 1300 provided, as it does today, that "[e]very officer, the mode of whose appointment is not prescribed *by law*, shall be appointed by the Governor." (Italics added.) Accordingly, the repeal did not affect the Legislature's primary authority to determine the mode of appointment of executive officers through legislation. Nothing in the constitutional change suggests any intent to withdraw constitutional authority from the Legislature or to grant additional constitutional authority to the Governor or any other official in the executive branch.

The other relevant constitutional provision of the 1879 Constitution – article VIII, section 5, relating to the Governor's authority to fill vacancies – was moved to article V, section 5, subdivision (a) as part of an earlier 1966 constitutional revision. The latter provision now reads: "*Unless the law otherwise provides,* the Governor may fill a vacancy in office by appointment until a successor qualifies." (Italics added.) By its terms, it is clear that this revision also did not withdraw any constitutional authority from the Legislature.

A brief filed by one of the many amici curiae in this matter argues that the early California separation of powers decisions that we have discussed above should be viewed as no longer applicable because of the change in the California Constitution in 1970. The brief contends that when the provision expressly recognizing the Legislature's authority over the appointment of executive officers was deleted from the Constitution, "the power became merely statutory, as its constitutional basis no longer exists."

This argument reflects a fundamental misunderstanding of state constitutional principles. As already noted, California decisions long have made it clear that under our Constitution the Legislature enjoys plenary legislative powers unless there is an explicit prohibition of legislative action in the Constitution itself. (See, e.g., *Fitts v. Superior Court, supra,* 6 Cal.2d 230, 234.) As we have seen, when the express constitutional provision relating to appointment of officers was removed from the California Constitution as part of the constitutional revision process in the early 1970's, the rationale for the deletion was that there was no need to retain the provision in the Constitution in view of the Legislature's plenary legislative authority on

this subject and the firmly established nature of its prerogative in this area. Thus, amicus curiae is in error in suggesting that the constitutional change in 1970 should be interpreted as having altered the allocation of authority between the legislative and executive branches with respect to the appointment of executive officers.

VIII

As the foregoing discussion reveals, from the inception of the California Constitution in 1849 it has been uniformly recognized that under our state's Constitution the appointment of executive officers is not an exclusively executive function that may be exercised only by members of the executive branch, and that the Legislature possesses the power to determine through legislative enactment by whom an executive officer should be appointed, including the authority to provide for the appointment of executive officers by the Legislature itself. Unlike the structure prescribed by the federal Constitution, under the California Constitution the general power to appoint executive officers never has been viewed as an inherent or exclusive power of the executive branch.

Contrary to the contention of Marine Forests, the case of *Parker v. Riley* (1941) 18 Cal.2d 83 is in no way inconsistent with this conclusion. In *Parker,* this court addressed a two-pronged constitutional challenge to a statute that created a Commission on Interstate Cooperation, a body "charged with the duty of furthering the participation of the state as a member of the Council of State Governments" and with "confer[ring] with officials of other states and the federal government to formulate proposals for cooperation between the state and such other

governments." (*Id.* at p. 84.) The statute established a five-member Senate Committee on Interstate Cooperation and a five-member Assembly Committee on Interstate Cooperation, whose members were to be chosen in the same manner as other legislative committees, and further provided that the membership of the overall state Commission on Interstate Cooperation was to be made up of the five members of the Senate Committee, the five members of the Assembly Committee, and five officials of the state to be appointed by the Governor.

In *Parker v. Riley, supra,* 18 Cal.2d 83, this statute was challenged as violative of two distinct provisions of the California Constitution. First, the court in *Parker* observed that "[t]he most serious challenge to the constitutionality of this legislation is advanced under section 19 of article IV of the California Constitution" (*id.* at p. 86), which declared that "'[n]o senator or member of the assembly shall, during the term for which he shall have been elected, hold or accept any office, trust or employment under this state; provided, that this provision shall not apply to any office filled by election by the people.'" (*Ibid.*)[20] The challengers claimed that membership in the commission constituted an "office, trust, or employment" within the meaning of this constitutional provision and thus that persons serving in the Legislature could not hold such a position. The court in *Parker* acknowledged that "[t]he sweeping terms of the California constitutional provision . . . prevent the appointment of a member of the legislature to any other position of trust or responsibility under the state" (*Parker v. Riley, supra,* at p. 87), but went

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[20] As noted above (*ante,* p. 29, fn. 12), a similar provision now is set forth in article IV, section 13, of the California Constitution.

on to conclude that membership on the Commission did not confer any "*other* office, trust, or employment" (*id.* at p. 88) upon the legislative members because the members' participation in the Commission was in effect an extension of the members' legislative duties of investigating legislative facts and proposing legislative solutions. On this point, the court concluded: "We hold, therefore, that the statute here attacked did not contemplate the conferring of any new office, trust, or employment upon the legislative members of this commission." (*Ibid.*)

After reaching the above conclusion, the court in *Parker* stated: "It must not be assumed, however, that legislative activities may be expanded indefinitely through the creation of separate agencies responsible primarily to the Legislature. . . . The Constitution forbids any such assumption of duties by the legislative branch of government, and a statute conferring a nonlegislative office or trust *upon members of the legislature* would clearly be unconstitutional." (*Parker v. Riley, supra,* 18 Cal.2d 83, 88, italics added.) Although Marine Forests relies upon the initial sentence of the immediately preceding quotation ("[i]t must not be assumed . . . that legislative activities may be expanded indefinitely") to support its separation of powers contention, in context it is clear that this statement in *Parker* referred only to the limits placed by the state Constitution *upon members of the Legislature* holding or accepting an appointment to another state office, and was not directed at the broad authority of the Legislature to appoint persons who do not hold legislative office to an executive branch office or agency.

In *Parker v. Riley, supra,* 18 Cal.2d 83, in addition to the foregoing constitutional challenge based upon the state constitutional provision limiting a member of the

Legislature from holding another state office during his or her legislative term of office, the statute in question also was challenged as a violation of the state separation of powers clause. In both respects, however, the *Parker* decision provides no support for Marine Forests' position. The separation of powers challenge in *Parker* was premised on the theory that certain duties performed by the Commission were executive in nature, and that the exercise of such powers by members of the legislative branch of government was impermissible under the separation of powers doctrine. The court in *Parker* rejected that claim, explaining that "[t]he doctrine has not been interpreted as requiring the rigid classification of all the incidental activities of government, with the result that once a technique or method of procedure is associated with a particular branch of the government, it can never be used thereafter by another." (*Id.* at p. 90.) In sum, nothing in *Parker* casts any doubt on the Legislature's well-established authority under the California Constitution to enact legislation authorizing the Legislature's appointment of members of an executive branch entity or agency.

IX

Although the resolution of the issue before us turns solely on the allocation of governmental authority established by the California Constitution, we note that, as in California, in the great majority of our sister states in which the question has been presented, the courts have held that under their respective state constitutions the power to appoint executive officers is not an exclusively executive function that may be exercised only by the Governor or another executive official, but rather is a power that may be exercised – either in general or in

appropriate circumstances – by the Legislature. (See, e.g., *Fox v. McDonald* (Ala. 1893) 13 So. 416, 420-421; *State ex rel. Woods v. Block* (Ariz. 1997) 942 P.2d 428, 434-435; *Cox v. State* (Ark. 1904) 78 S.W. 756, 756-758; *Seymour v. Elections Enforcement Com'n* (Conn. 2000) 762 A.2d 880, 895-897; *State ex rel. Craven* (Del. 1957) 131 A.2d 158, 162-164; *Caldwell v. Bateman* (Ga. 1984) 312 S.E.2d 320, 325; *Ingard v. Barker* (Idaho 1915) 147 P. 293, 295; *Betts v. Calumet Park* (Ill. 1960) 170 N.E.2d 563, 563-564; *Sedlak v. Dick* (Kan. 1995) 887 P.2d 1119, 1126-1130; *State Through Bd. of Ethics v. Green* (La. 1990) 566 So.2d 623, 624-626; *Buchholtz v. Hill* (Md. 1940) 13 A.2d 348, 351-352; *Oren v. Bolger* (Mich. 1901) 87 N.W. 366, 367-368; *Daley v. City of St. Paul* (1862) 7 Minn. 311, 314; *People v. Woodruff* (1865) 32 N.Y. 355, 364-365; *State of Nevada v. Rosenstock* (1876) 11 Nev. 128, 134-139; *State ex rel. Martin v. Melott* (N.C. 1987) 359 S.E.2d 783, 785-787; *State v. Frazier* (N.D. 1921) 182 N.W. 545, 548; *Wentz v. Thomas* (Okla. 1932) 15 P.2d 65, 68-69; *Biggs v. McBride* (Or. 1889) 21 P. 878, 880-881; *Pa. State Ass'n of Tp. Sup'rs v. Thornburgh* (Pa.1979) 405 A.2d 614, 616; *In re Advisory Opinion to the Governor* (R.I. 1999) 732 A.2d 55, 62-72; *Tucker v. Dept. of Highways* (S.C. 1994) 442 S.E.2d 171, 172-173; *Richardson v. Young* (Tenn. 1910) 125 S.W. 664, 667-675; *Brumby v. Boyd* (Tex. 1902) 66 S.W. 874, 876-877; *In re Appointment of Revisor* (Wis. 1910) 124 N.W. 670, 678.)

Of the minority of state cases that reach a contrary conclusion, some (albeit not all) are based upon language in a particular state constitution that explicitly grants the Governor a broad right to appoint executive officers or that explicitly prohibits the Legislature from making such appointments. (See *Bradner v. Hammond* (Alaska 1976)

553 P.2d 1, 3-8 [specific constitutional language]; *State v. Daniel* (Fla. 1924) 99 So. 804, 808 [same]; *Tucker v. State* (Ind. 1941) 35 N.E.2d 270, 278-304; *Legislative Research Com. v. Brown* (Ky. 1984) 664 S.W.2d 907, 920-924; *Opinion of the Justices* (Mass. 1974) 309 N.E.2d 476, 479-480; *Alexander v. State by and through Allain* (Miss. 1983) 441 So.2d 1329, 1343-1345; *State v. Washburn* (Mo. 1902) 67 S.W. 592, 594-596; *State v. Young* (Neb.1951) 48 N.W.2d 677, 679-681; *Richman v. Ligham* (N.J. 1956) 123 A.2d 32, 377-378 [specific constitutional language]; *State ex rel. Attorney General v. Kennon* (1857) 7 Ohio St. 546, 555-567 [same].)[21]

X

As demonstrated by the constitutional history and judicial decisions reviewed above, it is clear that the separation of powers clause of the California Constitution does not preclude *all* legislative enactments that authorize the Legislature itself to appoint an executive officer. Contrary to the assertion of the Attorney General, however, it does not follow that the California separation of powers clause places *no* limits on such legislation. Although the California decisions in *People v. Freeman, supra,* 80 Cal. 233, and *People v. Langdon, supra,* 8 Cal. 1, discussed above, rejected the broad claim advanced in each of those cases that under the California Constitution the

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[21] An extensive discussion and analysis of the early state authorities on this subject is set forth in a Comment on this court's decision in *People v. Freeman, supra,* 80 Cal. 233, appearing at 13 American State Reports 122, 125-147. Many of the more recent decisions are discussed in Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions* (1993) 66 Temp. L.Rev. 1205, 1242-1250.

appointment of an executive officer is an exclusively executive function and thus that the state constitutional separation of powers clause categorically precludes the Legislature from appointing such an officer, in neither case was the court called upon to address the narrower question whether there are nonetheless some circumstances in which legislative appointment of an executive officer may violate the separation of powers clause.

As past California decisions demonstrate, the circumstance that the California Constitution permits a particular governmental function (such as the appointment of an executive officer) to be exercised by a particular branch (here, the legislative branch) does not establish that the separation of powers clause places no limits on the exercise of that function by that branch (or by an entity within that branch). For example, although under the California Constitution the Legislature possesses the general authority to appropriate funds and designate the purpose for which such funds may and may not be expended, in *Mandel v. Myers* (1981) 29 Cal.3d 531, 547-550, we held that in exercising its appropriation authority, the Legislature may not undertake to readjudicate final judicial judgments on a case-by-case basis or limit the expenditure of appropriated funds to satisfy only those final judicial judgments with which the Legislature (or a legislative committee) agrees. We concluded in *Mandel* that such a use of the appropriation power improperly interferes with the judicial function and constitutes an improper exercise of judicial authority by the Legislature. Similarly, in *County of Mendocino, supra,* 13 Cal.4th 45, 58-59, we concluded that although the Legislature possesses constitutional authority to declare and designate legal holidays on which courts will be closed, the Legislature's exercise of

such authority would violate the separation of powers clause of the California Constitution were the Legislature to exercise such authority in a manner that would "'defeat' or 'materially impair' a court's exercise of its constitutional power or the fulfillment of its constitutional function." (See also *Obrien v. Jones* (2000) 23 Cal.4th 40, 44 [holding that in light of numerous structural and procedural safeguards, legislation providing that some of the judges of the State Bar Court shall be appointed by the executive and legislative branches "does not defeat or materially impair [the Supreme Court's] authority over the practice of law, and thus does not violate the separation of powers provision"]; *Brydonjack v. State Bar* (1929) 208 Cal. 439, 444 ["the legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions"].)

In the present case, Marine Forests contends that even if the California separation of powers clause does not categorically preclude the Legislature from appointing executive officers, the current Coastal Act provisions nonetheless are unconstitutional because these provisions – by authorizing the Legislature to appoint a majority of the voting members of the Commission and permitting the legislative appointees to be reappointed to successive terms – constitute an impermissible legislative usurpation of the functions of the executive branch. Invoking the language of the past California separation of powers decisions noted above, Marine Forests contends that the challenged statutes operate to "defeat or materially impair" the executive branch's exercise of its constitutional functions in two distinct respects: (1) by improperly impinging upon the authority granted by the California Constitution to the Governor (or to other constitutionally

prescribed executive officers), and (2) by compromising the ability of the Coastal Commission itself to exercise its own executive duties and functions without undue interference by the Legislature.

We agree that, consistent with the governing California case law, the appropriate standard by which the statutory provisions in question are to be evaluated for purposes of the state constitutional separation of powers clause is whether these provisions, viewed from a realistic and practical perspective, operate to defeat or materially impair the executive branch's exercise of its constitutional functions. We also agree that in applying this standard, it is appropriate to consider whether the statutes either (1) improperly intrude upon a core zone of executive authority, impermissibly impeding the Governor (or another constitutionally prescribed executive officer) in the exercise of his or her executive authority or functions, or (2) retain undue legislative control over a legislative appointee's executive actions, compromising the ability of the legislative appointees to the Coastal Commission (or of the Coastal Commission as a whole) to perform their executive functions independently, without legislative coercion or interference. As we shall explain, however, we conclude, contrary to Marine Forests' claims, that the current provisions of the Coastal Act do not violate the separation of powers clause in either of these respects.[22]

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[22] Courts in a number of other states – whose constitutions, like California's, do not preclude the legislative appointment of executive officers – have formulated a variety of standards for evaluating whether a particular statutory scheme embodying the legislative appointment of an executive officer violates the separation of powers clause contained in the state's constitution. (See, e.g., *State ex rel. Woods v. Block*, *supra*, 942 P.2d 428, 435 [Ariz.] ["the court must evaluate whether the

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For a number of reasons, we believe that it is quite clear that the legislative appointment of executive officers authorized by the statutory scheme under consideration does not impermissibly intrude or infringe upon what might be characterized as the "core zone" of the Governor's (or any other constitutionally prescribed executive officer's) executive functions.

First, the members of the Coastal Commission are not intimate advisors of the Governor or of any other constitutionally prescribed executive officer but rather are members of a commission of an independent administrative agency. Unlike the selection of a confidential aide whose function is to assist the Governor or other executive official in carrying out the official's constitutionally prescribed duties, legislative appointment of a member of such a commission cannot reasonably be found to impinge upon an exclusively executive prerogative. (Cf., e.g.,

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Legislature, through its appointments, has maintained control over an executive agency in violation of separation of powers"]; *Seymour v. Elections Enforcement Com'n, supra*, 762 A.2d 880, 896 [Conn.] [inquiring whether the "legislative appointment ... significantly interferes with the essential functions of the executive branch"]; *Sedlak v. Dick, supra*, 887 P.2d 1119, 1126-1130 [Kan.] [looking to "the nature of the power being exercised," "the degree of control by the legislative over the executive branch," "the objective of the legislature," and "the practical result"]; *State Through Bd. of Ethics v. Green, supra*, 566 So.2d 623, 624-626 [La.] [no separation of powers violation "as long as (1) the appointment of the members by the Legislature was constitutionally valid and (2) the appointees are not subject to such significant legislative control that the Legislature can be deemed to be performing executive functions through its control of the members of the board in the executive branch"].) Although the wording of the standards set forth in these decisions varies, most of the cases consider the same range of factors that we discuss below.

Obrien v. Jones, supra, 23 Cal.4th 40, 53 [citing cases restricting the authority of another branch to appoint "assistants upon whom the court relies in exercising judicial functions"]; *County of Mendocino, supra*, 13 Cal.4th 45, 65 [same]; accord, *Barland v. Eau Claire County* (Wis. 1998) 575 N.W.2d 691, 703 [holding that removal of judicial assistant falls within "the judiciary's core zone of exclusive power"].) Indeed, the executive positions here at issue are analogous to those at issue in *People v. Freeman, supra*, 80 Cal. 233, which, as noted, upheld a statute providing for the legislative appointment of commissioners of the state library board.

Second, as discussed above, the Coastal Commission is charged with a broad variety of functions, including both quasi-legislative and quasi-judicial functions as well as more traditional executive functions. (Cf. *Obrien v. Jones, supra*, 23 Cal.4th 40, 69 (dis. opn. by Kennard, J.) [indicating that in evaluating the propriety of an "inter-branch appointment," one appropriate consideration is whether the appointee's duties are "not purely executive or judicial or legislative, but of a combined or hybrid sort"]; accord, *Seymour v. Elections Enforcement Com'n, supra*, 762 A.2d 880, 897 [noting, in rejecting separation of powers challenge to legislative appointment of members of an election commission, that "commission members participate in activities traditionally thought of as judicial, legislative and, of course, executive"].) Thus, the Coastal Commission is quite distinct from the ordinary executive departments of state government, whose heads and policy making officials traditionally have been appointed by the Governor. (See, e.g., Gov. Code, § 12801 ["Each secretary [of specified state agencies] shall be appointed by, and hold office at the pleasure of, the Governor"].)

Third, the subject matter over which the Commission has been granted authority – land use planning within the coastal zone – is not a matter that the California Constitution assigns to the Governor or to any other constitutional executive officer, or even that, prior to the enactment of the Coastal Act, traditionally had been overseen by the state executive branch. Instead, the general subject matter of land use planning is one that traditionally has fallen within the domain of local governmental entities. Accordingly, the subject matter with which the Commission deals provides no basis for suggesting that legislative appointment of members of the Coastal Commission impinges upon a core zone of executive branch authority for purposes of the state constitutional separation of powers clause.[22]

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[22] We note that in this respect, the statutory provisions here at issue are fundamentally different from those involved in *Obrien v. Jones*, *supra*, 23 Cal.4th 40 (*Obrien*), a decision heavily relied upon by Marine Forests. In *Obrien*, we addressed the question whether a statutory provision that authorized the Governor, the Senate Rules Committee, and the Speaker of the Assembly each to appoint one of the five judges of the State Bar Court Hearing Department, with the remaining two State Bar Court Hearing Department judges to be appointed by this court, violated the separation of powers clause of the California Constitution. In analyzing that issue in *Obrien*, we noted at the outset that the subject matter encompassed within the duties of the appointees – the disciplining of licensed attorneys – "is an expressly reserved, primary, and inherent power *of this court*" (that is, the California Supreme Court). (*Obrien*, *supra*, 23 Cal.4th at p. 48, italics added.) By contrast, regulation of development on the California coast is not a function that historically has been exercised by either the Governor or any other constitutionally designated executive officer.

Obrien is distinguishable from the present case on other substantial grounds as well. Unlike the constitutional history and decisions reviewed above that confirm the general validity under the California Constitution of legislative appointment of *executive* officials, no similar constitutional history or judicial precedents were cited in *Obrien* that

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Finally, although Marine Forests contends that the challenged provisions conflict with the Constitution's vesting of the "supreme executive power" of the state in the Governor and its directive that the "Governor shall see that the law is faithfully executed" (Cal. Const., art. V, § 1), as we already have explained those constitutional provisions – which have been part of the California Constitution since 1849 (see, *ante*, pp. 30-31) – never have been viewed as granting the Governor the constitutional authority to appoint all executive officers or as conflicting with and invalidating any statutory provision that grants the Legislature the power to appoint an executive officer. (Accord, *Buchholtz v. Hill, supra*, 13 A.2d 348, 351-352; *Biggs v. McBride, supra*, 21 P. 878, 880-881.) We have no occasion in the present case to determine the appropriate relationship between the Governor's authority to "see that the law is faithfully executed" and the Coastal Commission's authority to perform its statutorily prescribed functions, because whatever the nature of that relationship may be, the balance of power between the Governor

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indicated the Legislature possesses any comparable general authority to appoint *judicial* officers. On the contrary, past cases had indicated that the appointment of subordinate judicial officers is a judicial function. (See *Obrien, supra*, 23 Cal.4th 40, 53 and cases cited.)

Nonetheless, in *Obrien* our court, after considering a variety of features within the statutory scheme that minimized the potential for conflict, concluded that although the Supreme Court's "inherent, primary authority over the practice of law extends to determining the composition of the State Bar Court and appointing State Bar Court judges[,] . . . this authority is not defeated or materially impaired" by the legislation at issue in that case. (*Obrien, supra*, 23 Cal.4th 40, 57.) Accordingly, neither the holding nor the analysis in *Obrien* conflicts with our conclusion that the current provisions governing the appointment and tenure of the members of the Coastal Commission do not violate the separation of powers clause of the California Constitution.

and the Commission does not depend upon the identity of the persons or entities who are statutorily authorized to appoint the individual members of the Commission. The California cases reviewed above clearly demonstrate that the Governor has no inherent or exclusive constitutional authority to appoint the members of such a commission, and that a statute does not violate the provisions of article V, section 1, or the separation of powers clause of the California Constitution simply because the statutory provision specifies that the appointment of an executive officer is to be made by someone other than the Governor.

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We also conclude that the current provisions of the Coastal Act do not improperly compromise the ability of the members of the Coastal Commission individually, or the Coastal Commission as a whole, to perform the Commission's functions independently and without undue or improper control by the legislative branch.

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With regard to the individual members who are appointed by either the Senate Rules Committee or the Speaker of the Assembly, Marine Forests contends initially that because each voting member of the commission exercises executive functions, the circumstance that the statutes authorize an appointing authority within the legislative branch to appoint as a voting member of the commission a person who shares the same "philosophy and politics" as the legislative appointing authority itself violates the separation of powers clause. *The authority to appoint a person to an executive office, however, is not the*

constitutional equivalent of the authority to exercise the executive functions of that office. The California decisions reviewed above that have upheld the validity of legislative appointment of executive officers directly refute the claim that the separation of powers clause of the California Constitution is violated whenever the Legislature or a legislative entity selects the person who it determines is best qualified to exercise the particular executive function in question.

Marine Forests further contends that even if a legislative entity's power *initially* to appoint an executive officer does not violate the separation of powers clause, the current Coastal Act provisions are invalid because they permit the Senate Rules Committee and the Speaker of the Assembly to *reappoint* a current member to a new term after the member's completion of his or her current term. Marine Forests acknowledges that the current provisions – by eliminating the previously existing power of the legislative appointing authorities to remove any appointee "at will" and by providing instead that each such appointee shall serve a four-year term – significantly reduces the potential control that the legislative appointing authorities may have over their appointees. (Accord, *State Through Bd. of Ethics v. Green, supra,* 566 So.2d 623, 626 [noting, in upholding statute authorizing legislative appointment of members of an executive board that "there is no continuing relationship between the Legislature and the appointees which extends the Legislature's control over the appointees in any significant degree beyond the original appointment"].) Marine Forests maintains, however, that the appointing authorities' continued power to reappoint a sitting commissioner itself

is incompatible with the separation of powers clause. We conclude that this claim lacks merit.

To begin with, Marine Forests cites no authority to support its contention that a legislative appointing authority's power to reappoint an incumbent officer is constitutionally suspect under separation of powers principles. As a general matter, in the absence of a specific limiting provision, the authority to appoint a person to an office includes the authority to reappoint the incumbent to a new term. We have not found any case holding that an appointing authority's power to reappoint an incumbent to office grants the appointing authority a constitutionally impermissible measure of control over the officeholder. In *People v. Freeman, supra,* 80 Cal. 233, this court upheld the validity, under the California separation of powers clause, of a statutory provision authorizing the Legislature to appoint members of an executive commission. In *Freeman,* the statute in question provided that the commission members would serve a four-year term, and nothing in the statute suggested that the Legislature was not free to reappoint a member to a new term once his or her existing term had expired.

Moreover, apart from the absence of supporting authority, we believe the contention is untenable on its merits. Under the current statute, as under the statute at issue in *Freeman,* each commissioner appointed by the Senate Rules Committee or the Speaker of the Assembly is appointed for *a four-year term.* Tenure of that substantial length of time – the term of office of the Governor of California and of the President of the United States – generally has been viewed as affording a public official a substantial degree of independence. In creating so-called independent administrative agencies within the federal

government that are intended to act with a considerable degree of autonomy, Congress frequently has established offices with similar terms, and generally has not precluded the reappointment of such officers. (See, e.g., 42 U.S.C. § 15323(b) [four-year term for members of the Federal Election Assistance Commission]; 47 U.S.C. § 154(c) [five-year term for members of the Federal Communications Commission]; 15 U.S.C. § 78d(a) [five-year term for members of the Securities and Exchange Commission].) Indeed, the four-year term now served by a Coastal Commission member appointed by the Senate Rules Committee or the Speaker of the Assembly is longer than the average length of time that an incumbent has served in the office of Speaker of the Assembly since the advent of legislative term limits in 1990.[24]

Further, in addition to prescribing the length of the term of office served by each of the commission members appointed by the Senate Rules Committee and the Speaker of the Assembly, the Coastal Act contains numerous procedural provisions governing the conduct of all commission members with regard to matters before the Commission. The Act sets forth extensive provisions explicitly aimed at ensuring the fairness and transparency of Commission action (§§ 30320-30329), as well as detailed substantive standards that commission members are duty-bound to apply (see, e.g., § 30604) through decisions, based upon evidence in the record before the Commission and with reasons stated, that are subject to judicial review.

[24] Since 1990, nine individuals have served as Speaker of the Assembly: Willie L. Brown, Jr., Doris Allen, Brian Setencich, Curt Pringle, Cruz Bustamante, Antonio R. Villaraigosa, Robert M. Hertzberg, Herb J. Wesson, and Fabian Núñez.

(§ 30801.) These provisions provide additional significant safeguards to ensure that, in the actual performance of their official duties, commission members are not interfered with or controlled by their appointing authority during their term of office.

2

Marine Forests additionally asserts that even if the current Coastal Act provisions do not violate the separation of powers clause with regard to individual members of the Commission, the challenged provisions nonetheless should be found unconstitutional in relation to their effect on the actions of the Coastal Commission as a whole. In this regard, Marine Forests contends that the statutes are fatally flawed because they permit a majority of the voting members of the Commission to be appointed by the Legislature.

Again, Marine Forests cites no authority supporting the proposition that the separation of powers clause embodied in article III, section 3, of the California Constitution prohibits the Legislature from enacting a statute that provides for a majority of the members of an executive commission to be appointed by the Legislature. On the contrary, as we already have seen, this court in *People v. Freeman, supra,* 80 Cal. 233, rejected a separation of powers challenge to a statute authorizing the Legislature to appoint *all* the members of a state executive board.

In any event, it is an oversimplification and potentially misleading to describe the Coastal Act provisions here at issue as authorizing *the Legislature* to appoint a majority of the voting members of the Coastal Commission.

To begin with, the statute does not authorize the Legislature, as a whole, to appoint any member of the Commission, but rather provides for the appointment of one-third of the voting members by the Governor, one-third by the Senate Rules Committee, and one-third by the Speaker of the Assembly. Although at times the Speaker of the Assembly and the members of the Senate Rules Committee will belong to the same political party, that certainly is not invariably the case, and even when these two appointing authorities happen to represent the same political party the two will not necessarily share the same views regarding either the best qualifications for membership on the Coastal Commission or the merits of issues that are likely to come before the Commission. The appointment structure established by the current Coastal Act provisions is distinguishable from one providing for appointment of executive officials by a joint vote of all members of the Legislature (see, e.g., *People v. Langdon*, *supra*, 8 Cal. 1) or by some comparable mechanism.

In considering the practical effect of this aspect of the statutory scheme, it is instructive to keep in mind that the provisions of the California Coastal Act dividing the authority to appoint the members of the Coastal Commission equally among the Governor, the Speaker of the Assembly, and the Senate Rules Committee were modeled largely upon the provisions of the 1972 coastal conservation initiative – a measure placed on the ballot by the efforts of concerned citizens outside the Legislature. The evident purpose of dividing the appointment authority in this fashion was *to disperse* such authority in order to avoid a situation in which one official who might not be sympathetic to the purpose and objectives of the Coastal Act could attempt to subvert those aims by appointing a

majority of Commission members who are hostile to those goals. In this regard, this aspect of the statutory scheme serves an objective that is analogous to one of the principal purposes of the separation of powers clause, *the avoidance of an aggregation of power in a single entity or officer.* (Accord, *State Through Bd. of Ethics v. Green, supra,* 566 So.2d 623, 626 ["Of course, the fact of original appointment may suggest the existence of some influence by the Legislature over the appointees, but even this possibility of control is dissipated by the spreading of the appointive powers among the Governor, the Senate, and the House of Representatives."]; *Parcell v. State* (Kan. 1980) 620 P.2d 834, 835-837 [upholding validity of 11-person elections commission, five members of which were appointed by the governor and six by members of the legislature (two by the president of the senate, two by the speaker of the house of representatives, one by the minority leader of the senate, and one by the minority leader of the house of representatives)].)

Furthermore, under the governing statutes neither the Senate Rules Committee nor the Speaker of the Assembly has unfettered discretion in making appointments to the Commission. As noted above, fully one-half of the appointees of both the Senate Rules Committee and the Speaker of the Assembly must be local public officials who have been nominated to their respective appointing authorities by local bodies from each geographic region covered by the Coastal Act. (§ 30301.2.) This provision affords a further check on the legislative appointing authorities and represents an additional dispersal of the power of appointment.

In addition, the recent amendments of the Coastal Act have enhanced the authority of the Governor in relation to

the legislative appointing authorities, inasmuch as the gubernatorial appointees to the Commission continue to serve at the pleasure of the Governor whereas the appointees of the Senate Rules Committee and the Speaker of the Assembly now serve fixed terms. It is also worth noting that all four nonvoting members of the Commission are part of the executive branch. (See, *ante*, p. 12, fn. 4.) (Accord, *State ex rel. Woods v. Block*, *supra*, 942 P.2d 428, 436-437 ["[A]lthough the [advisory] members have no voting rights, they still have the ability to influence the decisions of the board"].)

C

For all of the reasons discussed above, we conclude that the current provisions of the Coastal Act governing the composition and tenure of the voting membership of the Coastal Commission do not violate the separation of powers provision of the California Constitution. Accordingly, the judgment rendered by the trial court, enjoining the Commission from exercising non-legislative functions in the future, cannot be upheld.

XI

Although the relevant portion of the underlying complaint sought only injunctive relief and we therefore have determined the validity of the judgment by examining the *current* provisions of the Coastal Act, the parties have requested, in light of the Court of Appeal's conclusion that the prior statutory scheme was unconstitutional, that we clarify the current status of the numerous actions that were taken by the Coastal Commission during the time period in which the prior statutes were in effect. In light of

the substantial number of past administrative matters that potentially might be affected and because the question has been extensively briefed, we conclude that it is appropriate to address the issue at this time.

Marine Forests maintains that even if, as we have concluded, the current version of the Coastal Act is constitutional, the prior version of the statutes was fatally flawed. Marine Forests asserts in this regard that the Court of Appeal correctly concluded that the prior statutory scheme – by providing that the commissioners appointed by the Senate Rules Committee and the Speaker of the Assembly served at the pleasure of their legislative appointing authority and thus could be removed by such appointing authorities at will – rendered a majority of the voting members of the Commission improperly subservient to the Legislature, and for that reason violated the separation of powers clause of the California Constitution.[25] In response, the Attorney General points out that prior provisions of the California Constitution, in addition

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[25] In support of this claim, several amici curiae have requested that we take judicial notice of a partial transcript of a July 1987 hearing before the Coastal Commission, and of newspaper articles discussing the hearing, that suggest that in at least one instance during the time that the prior statutory provisions were in effect, a legislative appointing authority removed a legislative appointee to the Commission because of the appointee's substantive position on a pending matter. Because, as we discuss below (*post*, pp. 60-65), we conclude that past actions of the Commission may not be set aside on the basis of the prior appointment and tenure structure, even if we were to assume that the prior statutory scheme was unconstitutional, the materials in question would not affect our decision in this case. For this reason, we decline to take judicial notice of the material in question. (See, e.g., *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1065.) On similar grounds, the additional requests for judicial notice filed by Marine Forests and other amici curiae also are denied.

to authorizing the Legislature to determine how and by whom executive officers should be *appointed*, authorized the Legislature to determine the tenure of executive officers and explicitly provided that when their tenure was not specified, the officer would serve *during the pleasure of the appointing authority*. (See Cal. Const. of 1849, art. XI, § 7; Cal. Const. of 1879, art. XX, § 16.) The Attorney General argues that in light of these earlier constitutional provisions, the prior version of the Coastal Act – specifying that all members of the Commission were to serve at the pleasure of their appointing authority – may not properly be found to violate the separation of powers clause of the California Constitution.

Although there is no question but that the pre-2003 provisions of the Coastal Act pose a much more serious separation of powers question than the current provisions of the Act (cf. *State ex rel. Woods v. Block, supra*, 942 P.2d 428, 438 (conc. & dis. opn. by Martone, J.) [finding that the absence of set terms for legislative appointees "provides the Legislature indirect, yet substantial control over the members it appoints"]), we conclude there is no need to determine definitively the validity of the earlier statutory provisions in order to clarify the status of the numerous actions that were taken by the Commission at a time when its members were selected and served pursuant to the provisions of those statutes. As we shall explain, even if we were to assume (as Marine Forests contends) that the prior version of the statutes violated the separation of powers clause, the past actions of the Commission could not properly be set aside on that ground at this time.

To begin with, the applicable statute of limitations would bar a present challenge to most of the prior actions of the Commission. (See § 30801 [permit decisions of the

Commission are final if not challenged by writ petition within 30 days]). Contrary to the contention of Marine Forest, a judicial decision that found the prior version of the applicable statutes unconstitutional would not provide a basis for recommencing the statute of limitations with regard to past actions of the Commission. (See, e.g., *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 815-817.) Furthermore, with regard to those actions of the Commission as to which a timely challenge had been filed and that had proceeded to a final judicial decision, res judicata principles would preclude a present challenge to the final decision. (See, e.g., *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795-797.)

In addition, even with regard to those cases in which a timely separation of powers challenge to the Commission's composition has been raised and that remain pending either before the Commission or the courts, we conclude that under the "de facto officer" doctrine prior actions of the Commission cannot be set aside on the ground that the appointment of the commissioners who participated in the decision may be vulnerable to constitutional challenge. As this court explained in *In re Redevelopment Plan for Bunker Hill* (1964) 61 Cal.2d 21, 41-42: "The de facto doctrine in sustaining official acts is well established. [Given the existence of] a de jure office, '[p]ersons claiming to be public officers while in possession of an office, ostensibly exercising their function lawfully and with the acquiescence of the public, are *de facto* officers. . . . The lawful acts of an officer *de facto*, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it.' [Citations.]" (See also

Pickens v. Johnson (1954) 42 Cal.2d 399, 410 ["There is no question but that . . . the status of a judge de facto attached to his action. The office to which he was assigned was a de jure office. By acting under regular assignment under a statute authorizing it he was acting under color of authority as provided by law. His conduct in trying the cases and rendering judgment therein cannot here be questioned."].)

Past California cases make clear that the de facto officer doctrine is applicable when the officer in question acts " 'under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such' " (*Oakland Pav. Co. v. Donovan* (1912) 19 Cal.App. 488, 495, quoting *State v. Carroll* (1871) 38 Conn. 449 [9 Am.Rep. 409]; see, e.g., *People v. Elkus* (1922) 59 Cal.App. 396, 407-408), and further establish that the de facto officer doctrine is applicable even when the challenge to the validity of an officer's appointment or qualifications has been timely raised in an administrative or judicial proceeding contesting the validity of an official action of the officer, because the doctrine contemplates that a valid challenge to the officer's qualifications must be raised and resolved in a separate proceeding. (See, e.g., *Town of Susanville v. Long* (1904) 144 Cal. 362, 364-365; *People v. Bowen* (1991) 231 Cal.App.3d 783, 789-790; *Ensher, Alexander & Barsoom, Inc. v. Ensher* (1965) 238 Cal.App.2d 250, 256-257.)[28]

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[28] Marine Forests contends that the de facto officer doctrine should not be applied in cases in which a challenge to the validity of the Commission's composition has been timely raised in the administrative or judicial proceeding, on the ground that application of the doctrine in such cases improperly would deter parties from ever raising an

(Continued on following page)

Marine Forests maintains that the de facto officer doctrine is inapplicable here because the separation of powers challenge relates to the scope of the actions that the Coastal Commission properly may undertake (assertedly only quasi-legislative actions, and not executive or quasi-judicial actions) rather than to the validity of the

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objection to provisions governing the appointment or tenure of Commission members. (Cf. *Ryder v. United States* (1995) 515 U.S. 177, 182.) The pre-2003 provisions governing the appointment and tenure of members of the Coastal Commission had been in effect since the enactment of the Coastal Act in 1976, however, and any individual had ample opportunity to bring an action challenging, under the separation of powers clause, the validity of those provisions in light of the statutory duties the commission had been granted.

Furthermore, unlike the situation presented in *Ryder* where the United States Supreme Court declined to apply the de facto officer doctrine to an unusual appointment procedure affecting only seven to ten cases (*Ryder v. United States, supra*, 515 U.S. at p. 185), the failure to apply the de facto officer doctrine where the challenge is to a general statutory provision governing the appointment and tenure of the members of an administrative agency like the Coastal Commission potentially would place hundreds or even thousands of administrative rulings at risk, because once such a challenge has been upheld at the trial court level (or even simply seriously advanced by one litigant), other litigants before the agency routinely might proffer such a challenge in every case, threatening the validity of all subsequent actions of the agency. In the present case, for example, once the trial court sustained Marine Forests' separation of powers claim, numerous other parties, on the same grounds, challenged the Commission's authority to act. Although the trial court's ruling was not a final judicial determination of the constitutional issue, and the trial court stayed its ruling pending appeal, a failure to apply the de facto officer doctrine to any proceeding in which the separation of powers claim timely was raised potentially would place in jeopardy many if not all of the actions taken by the Commission after the trial court's ruling. As is demonstrated by the California decisions cited above, adoption of Marine Forests' position would defeat the principal purpose underlying the de facto officer doctrine. (See, e.g., *Town of Susanville v. Long, supra*, 144 Cal. 362, 365.)

appointment of the members of the Coastal Commission. We disagree.

The challenge advanced by Marine Forests relates to the great bulk of the actions that the Commission was statutorily empowered to undertake, and rests on the contention that the Commission was not authorized to perform such functions because two-thirds of its members were appointed and were subject to removal at will by legislative rather than executive entities. This type of claim differs fundamentally from a challenge to the Commission's grant or denial of an individual permit or its issuance of an individual cease and desist order – an attack based, for example, on a claim that the Commission's action is not supported by substantial evidence or that the particular conditions imposed on a development permit are not sufficiently related to a legitimate governmental purpose. Instead, the challenge here at issue rests upon features of the commission members' appointment and tenure that would affect the Commission's authority to act in *all* similar quasi-judicial or executive matters.

In essence, Marine Forests contends that there was a constitutional defect in the statutory provisions governing the appointment and tenure of the commission members that rendered the Commission not legally qualified to act on any quasi-judicial or executive matter. As past California decisions demonstrate, a principal purpose of the de facto officer doctrine under California law is to prevent the crippling of an officer's or commission's operations that would occur if this type of claim (which could affect virtually all of the Commission's actions) could be raised in any proceeding challenging an individual action taken by the officer or commission. This debilitating effect is avoided if such a challenge is brought in a separate proceeding that

focuses directly on the validity of the officer's or commission's status and in which the requested relief, if ultimately granted by a final judicial decision, would apply only prospectively. (See, e.g., *Town of Susanville v. Long, supra,* 144 Cal. 362, 365.) In light of this objective, the asserted invalidity here at issue is similar to other claimed defects in an officer's legal qualifications to which the de facto officer doctrine has been applied.

Indeed, in *Buckley v. Valeo, supra,* 424 U.S. 1, 142, the United States Supreme Court effectively applied the de facto officer doctrine in a setting directly analogous to that presented here. In *Buckley,* after concluding that the statutory provisions governing the composition of the Federal Elections Commission at issue in that case violated the separation of powers doctrine under the federal Constitution because four of the six voting members of the commission were appointed by members of Congress, the high court nonetheless went on to uphold the validity of all past actions of the Commission under the de facto officer doctrine. The court in *Buckley* stated in this regard: "It is . . . our view that the Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date, including its administration of those provisions, upheld today, authorizing the public financing of federal elections. The past acts of the Commission are therefore accorded *de facto* validity, just as we have recognized should be the case with respect to legislative acts performed by legislators held to have been elected in

accordance with an unconstitutional apportionment plan." (424 U.S. at p. 142.)[27]

Marine Forests further contends that the de facto officer doctrine should not be applied to past actions of the Coastal Commission, because in some instances in the past, courts have found that certain actions taken by the Coastal Commission – for example, various requirements imposed by the Commission as a condition of granting a development permit – may have violated the constitutional rights of a party or parties before the Commission. (See, e.g., *Nollan v. California Coastal Com.* (1987) 483 U.S. 825.) But Marine Forests fails to cite any California authority supporting the imposition of such a limitation on the de facto officer doctrine, a limitation that largely would eviscerate the doctrine and that finds no support in its underlying purpose. Of course, if a past action of the Commission remains subject to judicial review and is vulnerable to challenge on some other ground, the de facto officer doctrine will not provide a bar to such a challenge. Under the doctrine, however, the circumstance that the statutory provisions governing the appointment and tenure of the members of the Commission who acted upon

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[27] Indeed, the high court in *Buckley* permitted the unconstitutionally constituted Federal Elections Commission to continue to act for 30 days after the court's decision was issued, explaining: "We also draw on the Court's practice in the apportionment and voting rights cases and stay, for a period not to exceed 30 days, the Court's judgment insofar as it affects the authority of the Commission to exercise the duties and powers granted it under the Act. This limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms, without interrupting enforcement of the provisions the Court sustains, allowing the present Commission in the interim to function *de facto* in accordance with the substantive provisions of the Act." (*Buckley v. Valeo*, *supra*, 424 U.S. at pp. 142-143.)

a particular matter might be vulnerable to constitutional challenge provides no independent basis for overturning the action taken by the Commission.[28]

Accordingly, we conclude that even if we were to assume that the trial court and the Court of Appeal were correct in determining that the prior version of the Coastal Act provisions governing the composition and tenure of the members of the Coastal Commission violated the separation of powers clause of the California Constitution, past actions of the Commission could not properly be challenged on that ground.

XII

For the reasons discussed above, the judgment rendered by the Court of Appeal, affirming the trial court's judgment enjoining the Coastal Commission from granting, denying, or conditioning permits and from hearing cease and desist orders, is reversed.

GEORGE, C.J.

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[28] In support of the argument that past actions of the Commission should be subject to challenge on the basis of the alleged invalidity of the pre-2003 Coastal Act provisions, Marine Forests and several amici curiae argue that the 2003 legislation should not be given retroactive effect. We agree that the 2003 provisions apply only prospectively, but the application of the de facto officer doctrine is not affected by this conclusion. As explained above, the de facto officer doctrine provides that even if the statutory provision under which a public officer is appointed is vulnerable to constitutional challenge, official actions taken by the public officer before the invalidity of his or her appointment has been finally adjudicated may not be overturned on that basis.

WE CONCUR:
KENNARD, J.
BAXTER, J.
WERDEGAR, J.
CHIN, J.
BROWN, J.
MORENO, J.

CONCURRING OPINION BY KENNARD, J.

In *Obrien v. Jones* (2000) 23 Cal.4th 40, as here, this court considered a challenge under the California Constitution's separation of powers provision (Cal. Const., art. III, § 3) to legislation authorizing interbranch appointments. In both cases, this court rejected the challenge. In *Obrien* I dissented (23 Cal.4th at p. 63), while here I concur, for reasons I now explain.

The laws at issue in *Obrien v. Jones* (2000) 23 Cal.4th 40 granted officers of the executive and legislative branches (the Governor, the Senate Rules Committee, and the Speaker of the Assembly) the authority to appoint and reappoint judges of the State Bar Court (Bus. & Prof. Code, § 6079.1) and altered that court's composition by eliminating public representation (*id.*, § 6086.65). Summarizing my reasons for concluding that these laws were invalid, I wrote: "Because the State Bar Court operates as an arm of this court in hearing attorney discipline matters, and because this court has primary authority over attorney discipline, judges of the State Bar Court are subordinate judicial officers that must be answerable only to this court. Because the law at issue makes State Bar Court judges subservient to members of the political branches, and because it alters the composition of the State Bar Court in a way likely to reduce public confidence

in the attorney discipline system, the law is invalid under the separation of powers clause of the California Constitution." (*Obrien v. Jones, supra*, 23 Cal.4th at p. 63.)

The law at issue here (Pub. Resources Code, § 30301) grants the Governor, the Senate Rules Committee, and the Speaker of the Assembly authority to appoint members of the California Coastal Commission, an administrative agency within the executive branch having as its main task the regulation of land use in the state's coastal areas. In performing this task, the commission does not act as an arm of the Governor or of any other executive branch officer, but instead the commission operates independently. Like many administrative agencies, the commission's role is not purely executive, but instead much of its work is quasi-legislative and quasi-judicial. As I have written, interbranch appointments are justified when the appointee's duties have this hybrid character. (*Obrien v. Jones, supra,* 23 Cal.4th at p. 69 (dis. opn. of Kennard, J.).)

In brief, the interbranch appointment laws at issue in *Obrien,* in my view, improperly invaded this court's authority over attorney discipline, whereas the interbranch appointment laws at issue here do not improperly invade the traditional authority of the Governor or of any other constitutional officer of the executive branch. Moreover, the hybrid character of the California Coastal Commission's duties provide adequate justification for interbranch appointments. For these reasons, I have added my signature to the court's opinion.

KENNARD, J.

CONCURRING OPINION BY BAXTER, J.

I agree generally with the separation of powers test stated by the majority, and with its application of that test to the narrow circumstances of this particular case. In light of the unique history and function of the Coastal Commission (Commission), I accept the majority's conclusion that the *current* version of the California Coastal Act (Coastal Act; Pub. Resources Code, § 30000 et seq.)[1] does not violate the separation of powers by providing that the Governor, the Senate Rules Committee, and the Speaker of the Assembly shall each *appoint* one-third of the Commission's voting members. I also concur that, technically, we may confine our analysis to the law as currently in effect, because this case concerns only the prospective validity of an injunction, and the "de facto officer" doctrine would protect the official acts of commissioners who held their offices, under color of authority, pursuant to the prior scheme.

As the majority suggests, the Commission is a modern, somewhat hybrid statutory creation. It has succeeded, on behalf of the state, to certain land use planning functions – executive, quasi-legislative, and quasi-judicial – that were traditionally the province of local government. Though formally lodged within the executive branch, the Commission has an independent mission. Neither the Commission nor its members directly assist the Governor, or any other constitutional executive officer, in carrying out that officer's prescribed duties. Hence, legislative participation in appointing the Commission's members

[1] All further unlabeled statutory references are to the Public Resources Code.

does not "impinge[] upon a core zone of executive branch authority" (maj. opn., *ante,* at p. 51), or upon an "exclusively executive prerogative" (*id.,* at p. 49), as prohibited by the separation of powers clause.

Moreover, safeguards contained in the current version of the Coastal Act ensure Commissioners, once in office, a substantial measure of insulation from their appointing authorities. Hence, the law's appointment provisions, as now in effect, "do not improperly compromise the ability of the . . . Commission['s] [members] individually, or [of] the . . . Commission as a whole, to perform the Commission's functions independently" of the legislative branch. (Maj. opn., *ante,* at p. 53.)

The individual history, nature, and function of this agency make me especially reluctant to overturn the current statutory method of appointing its voting members. In particular, I am mindful that the Commission's long tradition of membership by both state and local representatives, with substantial appointment power vested in both the executive and legislative branches of state government, originated with the voters of California.

As the majority recount, today's Commission has its genesis in a 1972 initiative measure, Proposition 20, enacted by the voters at the November 7, 1972 General Election (hereafter Proposition 20). This measure created a statewide agency, the California Coastal Zone Conservation Commission (1972 statewide commission) – the direct predecessor of the present Commission – as well as six regional commissions (1972 regional commissions) covering the affected coastal areas. (Former §§ 27200-27243, as enacted by Prop. 20.) Each of the 1972 regional commissions included an equal number of local officials and public

members – the latter appointed, one-third each, by the Governor, the Senate Rules Committee, and the Assembly Speaker. (Former § 27201, 27202, subd. (d), as enacted by Prop. 20.) The 1972 statewide commission itself had 12 voting members – six regional representatives, one appointed by each 1972 regional commission from among its own members, and six public members appointed, one-third each, by the Governor, the Senate Rules Committee, and the Assembly Speaker. (Former §§ 27200, 27202, subd. (d), as enacted by Prop. 20.) The 1972 initiative law was repealed, by its own terms, as of January 1, 1977. (Former § 27650, as amended by Stats. 1974, ch. 897, § 2, p. 1900.)

The initiative's successor legislation, the Coastal Act (§ 30000 et seq., as enacted by Stats. 1976, ch. 1330, p. 5951 et seq.), created the present statewide Commission, as well as six successor regional commissions that would terminate no later than January 1, 1981. (Former §§ 30300-30305, as enacted by Stats. 1976, ch. 1330, § 1, pp. 5966-5969.) The voting membership of the statewide Commission, like that of its 1972 predecessor, included six regional representatives and six statewide public members – the latter appointed equally, as before, by the Governor, the Senate Rules Committee, and the Assembly Speaker. (Former § 30301, subds. (d), (e), as enacted by Stats. 1976, ch. 1330, § 1, p. 5966.)

In turn, the regional commissions were constituted, and their members were appointed, essentially as under the 1972 initiative scheme. So long as a regional commission remained in existence, its representative on the statewide Commission was selected by the regional commission itself, from among its own members, as under prior law. When a regional commission ceased to exist, its representative on the statewide Commission would be

replaced by a city councilperson or county supervisor from that region, selected from a list of such officials nominated at the local level. The power to appoint this new representative from the list of nominees fell directly to the Governor, the Senate Rules Committee, or the Assembly Speaker according to a specified rotation, so as to ensure that, once all the regional commissions ceased existence, each appointing authority would choose an equal number of regional representatives to the statewide Commission. (Former §§ 30301, subds. (d), (e), 30301.2, 30303, as enacted by Stats. 1976, ch. 1330, § 1, pp. 5966-5967.)

After all the regional commissions had terminated, the Coastal Act was amended to eliminate reference to them, and to confirm that the Governor, the Senate Rules Committee, and the Assembly Speaker shall each appoint one-third of the statewide Commission's 12 voting members. As has been true since the regional commissions ceased existence, this membership is equally divided between regional representatives, chosen from lists of eligible local officials submitted by local nominating bodies, and statewide public members. (§ 30301, subds. (d), (e), as amended by Stats. 1991, ch. 285, § 5, p. 1796; § 30301.2, subd. (a), as amended by Stats. 1991, ch. 285, § 6, p. 1796.)

This evolution of the scheme for appointment of the Commission's voting members, though complex, reflects a continuing adherence to the electorate's original desire that the membership of the statewide agency charged with protecting California's coastal resources should be carefully balanced between statewide and local interests, and that appointments to the agency should come from both the executive and legislative branches. Indeed, retention of this system under current law does not suggest a "power

grab" instigated by the Legislature itself, but rather an acceptance of the electorate's design, as set forth in the 1972 initiative. After the Commission has operated for some three decades under this scheme, we would be hard-pressed to find that all, or at least most, of its members have been appointed unconstitutionally.

That said, I reserve the right to examine, on a case-by-case basis, other statutory schemes for legislative participation in naming persons to hold positions in the executive branch, as such schemes may now or hereafter exist. My concurrence in today's judgment is narrowly confined to the current Coastal Act. It does not constitute any concession on my part that the Legislature generally may arrogate such nominating authority to itself without running afoul of the separation of powers clause.

The Founders recognized the Legislature as "the branch most likely to encroach on the powers of the other branches." (*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 298.) Legislators may often have a political incentive to enhance their own authority and influence at the expense of the executive branch and its officials. Such legislative schemes must be scrutinized with the utmost care to ensure that the constitutional functions and prerogatives of the executive are carefully preserved.

Finally, though it is not strictly necessary to address the issue, I note I would find that the Coastal Act *was* constitutionally flawed until amended in 2003. Prior to this amendment, the statute provided that all the Commission's voting members, including those appointed by the Senate Rules Committee and the Assembly Speaker, would serve "for two years *at the pleasure of their appointing power.*"

(Former § 30312, subd. (b), as enacted by Stats. 1976, ch. 1330, § 1, p. 5970, italics added.) Thus, under the former law, the appointing officials or bodies, including those from the Legislature, could *remove* their Commission appointees at will.

The pre-2003 version was in effect when this case came before the Third District Court of Appeal. That court struck down the scheme, concluding that the legislative power both to appoint *and to remove* a majority of the Commission's members violated the separation of powers. As Presiding Justice Scotland stated in his opinion for the court: "[Former] [s]ection 30312 gives the Speaker of the Assembly and the Senate Committee on Rules virtually unfettered authority over the appointment of a majority of the Commission's members, *and wholly unfettered power to remove those members at the will of the Legislature.* The presumed desire of those members to avoid being removed from their positions creates an improper subservience to the legislative branch of government. . . . Consequently, this statutory scheme gives the Legislature excessive control over the Commission in the exercise of powers, and in the execution of duties, that are executive in character." (Italics added.) Spurred by the Court of Appeal's decision, the Legislature promptly amended the law to the form now before us. (§ 30312, as amended by Stats. 2003, 2d Ex. Sess., ch. 1X, § 1.)

Removal at pleasure was an implicit feature of the 1972 commissions established by Proposition 20. (See *Brown v. Superior Court* (1975) 15 Cal.3d 52 [1972 regional commissioners].) To the extent the removal power was thus part of the voters' original design in 1972, it is due considerable deference. Nonetheless, I concur fully in Presiding Justice Scotland's conclusion that the pre-2003

version of the Coastal Act overstepped constitutional bounds insofar as it included a legislative removal power. Quite clearly, if officials of the legislative branch have *moment-by-moment control* over the tenure of most of an executive agency's voting members, the agency cannot perform its executive functions free of undue legislative influence. Accordingly, the removal provision contravened the second prong of the test applied by the majority (see discussion, *ante*), and thus violated the separation of powers.

BAXTER, J.

I CONCUR:

BROWN, J.

CONCURRING OPINION BY WERDEGAR, J.

I agree with the majority that, even were this court to hold that the California Coastal Commission's (Commission) former appointment structure made it essentially a legislative agency prohibited from exercising executive or judicial powers under separation-of-powers principles, the de facto officer doctrine (or a closely related rule) would bar a separation-of-powers challenge to particular executive and quasi-judicial acts of the Commission brought before a court had finally determined, in an action for injunctive or declaratory relief, that the performance of such acts was unconstitutional. For that reason, as the majority explains, we need not decide whether the Commission's former structure did render it subservient to the Legislature. (Maj. opn., *ante*, at p. 61.)

I write separately to stress *why* the de facto officer doctrine (or a closely related rule) applies here. While

plaintiffs' separation-of-powers challenge is not, strictly speaking, an attack on the qualifications or appointment of any particular officer, it does, as the majority observes, rest on aspects of the Commission members' appointment and tenure; consequently, if successful, it would, like a collateral attack on an officer's qualifications or appointment to office, undermine the validity of all the Commission's executive or quasi-judicial acts. (Maj. opn., *ante*, at p. 64.) Because of the reasonable public reliance on an agency's prima facie legitimacy, to require that this type of challenge be brought first in an action for prospective relief rather than in a direct attack on past agency actions is appropriate and fair.

The majority, as I understand it, does not embrace any broader doctrine precluding a party from raising fundamental flaws in an agency action directly in challenges to those actions. As a general rule, individuals aggrieved by government actions affecting them or their property may present fundamental legal challenges in a timely complaint or petition directly attacking the government action. (See *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 767-769 [challenge to permit conditions imposed under allegedly unconstitutional and preempted ordinance]; *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 819-822 [challenge to continued collection of tax under ordinance allegedly adopted in violation of state law].) The court's opinion today should not be read as suggesting, instead, that a separate action for declaratory or injunctive relief must generally be successfully pursued before an agency's actions can be challenged as unconstitutional.

With this understanding, I have signed the majority opinion.

WERDEGAR, J.

I CONCUR:

BROWN, J.

APPENDIX B

Filed: 12/30/02

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

MARINE FORESTS SOCIETY et al., Plaintiffs and Respondents, v. CALIFORNIA COASTAL COMMISSION et al., Defendants and Appellants.	C038753 (Super. Ct. No. 00AS00567)

APPEAL from a judgment of the Superior Court of Sacramento County, Charles C. Kobayashi, J. Affirmed.

The Zumbrun Law Firm and Ronald A. Zumbrun for Plaintiffs and Respondents.

Sheppard, Mullin, Richter & Hampton, Joseph E. Petrillo, David P. Lanferman, Thomas D. Roth, Peter F. Ziblatt for the Home Builders Association of Northern California, The California Building Industry Association, The Building Industry Legal Defense Foundation, The Building Industry Association of San Diego and The California Association of Realtors; M. Reed Hopper and Anne M. Hayes for Pacific Legal Foundation; Jenkins & Hogin, Christi Hogin and Gregg Kovacevich for the City of Malibu; Berger & Norton and Michael M. Berger for

Signal Landmark and Hearthside Homes as Amici Curiae on behalf of Plaintiffs and Respondents.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, J. Matthew Rodriquez, Senior Assistant Attorney General, Joseph Barbieri, Supervising Deputy Attorney General, and Lisa Trankley, Deputy Attorney General, for Defendants and Appellants.

The California Coastal Commission (the Commission) is the "state coastal zone planning and management agency" with the primary responsibility for implementing the provisions of the California Coastal Act of 1976. (Pub. Resources Code, §§ 30300, 30330; further section references are to the Public Resources Code unless otherwise specified.) It consists of 12 voting members, 4 appointed by the Governor and 8 appointed by the Legislature, who serve two-year terms at the pleasure of their appointing authorities. (§§ 30301, 30301.5, 30312.) The Commission acts by vote of a majority of its appointed members. (E.g., §§ 30333, 30512.)

When the Commission notified Marine Forests Society (Marine Forests) that it intended to commence cease and desist proceedings regarding Marine Forests's experimental man-made reef on the ocean floor off of Newport Harbor in southern California, Marine Forests filed an action seeking to enjoin the Commission from doing so. Marine Forests claimed, among other things, that the Commission did not have the authority to issue cease and desist orders or to grant or deny permits for coastal development because the scheme for appointment of its voting members gives the legislative branch control over the Commission, thus impermissibly interfering with the

Commission's executive branch responsibility to execute the laws.

The trial court held that the ability of the Senate Committee on Rules and the Speaker of the Assembly to remove a majority of the Commission's voting members at the pleasure of those appointing authorities effectively makes the Commission a "legislative agency." Therefore, the court enjoined the Commission "as a legislative body . . . from exceeding its jurisdiction and violating the Separation of Powers Clause of the California Constitution [Cal. Const., art. III, § 3] which precludes it from granting, denying or conditioning permits or [from] issuing and hearing cease and desist orders." The Commission appeals. (Code Civ. Proc., § 904.1, subd. (a)(6).)

For reasons that follow, we conclude that the Commission's interpretation and implementation of the California Coastal Act of 1976 is an executive function, and that the appointment structure giving the Senate Committee on Rules and the Speaker of the Assembly the power not only to appoint a majority of the Commission's voting members but also to remove them at will contravenes the separation of powers clause of California's Constitution. The flaw is that the unfettered power to remove the majority of the Commission's voting members, and to replace them with others, if they act in a manner disfavored by the Senate Committee on Rules and the Speaker of the Assembly makes those Commission members subservient to the Legislature. In a practical sense, this unrestrained power to replace a majority of the Commission's voting members, and the presumed desire of those members to avoid being removed from their positions, allows the legislative branch not only to declare the law but also to control the Commission's

execution of the law and exercise of its quasi-judicial powers.

Accordingly, we shall affirm the judgment. We emphasize, however, that Marine Forests made a timely separation of powers objection and pursued its remedies in a timely manner. We do not address the rights and interests of other parties to prior actions of the Commission.

BACKGROUND

The California Coastal Act of 1976 (the Coastal Act) (§ 30000 et seq.) is a comprehensive scheme governing land use planning for the entire coastal zone of California. It contains specific policies pertaining to public access (§§ 30210-30214), recreation (§§ 30220-30224), the marine environment (§§ 30230-30237), coastal resources (§§ 30240-30244), and various categories of development, including residential, industrial, port, and energy facilities. (§ 30250 et seq.) In sections 30001, 30001.5 and 30004, the Coastal Act sets forth detailed recitations of legislative goals that (1) declare the need to protect the distinct and valuable natural resources of California's coastal zone, (2) state that planned development of the coastal zone is essential to the economic and social welfare of the people of this state, (3) advocate the protection, maintenance, and balanced development of the coastal zone environment, (4) seek to maximize public access to the coast consistent with sound resources conservation as well as the constitutional protection of private property rights, (5) encourage local and state initiative and cooperation in planning coastal use, and (6) declare that, in order to achieve maximum responsiveness to local conditions, it is necessary to rely heavily on local government and local land use planning

procedures and enforcement while (a) providing for maximum state involvement in federal activities, (b) protecting regional, state, and national interests, and (c) coordinating the many agencies whose activities affect the coastal zone.

The Coastal Act established the Commission as a permanent regulatory body invested with the primary responsibility to ensure continued coastal planning and management through implementation of the provisions of the Coastal Act. (§ 30330.) The Commission may exercise all the powers set forth in the Federal Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.) or in any other federal act that relates to the planning or management of the coastal zone. (§ 30330.) It is authorized to promulgate regulations to carry out the purposes and provisions of the Coastal Act (§ 30333), to conduct additional studies that the Commission determines to be necessary to accomplish the goals of the Coastal Act (§ 30341), and to prepare an informational and educational guide to coastal resources for the public. (§ 30344.)

The Commission also hears and decides applications for coastal permits (§§ 30600-30627), reviews the coastal programs of local governments (§§ 30512-30514), and issues cease and desist orders to halt or remove illegal development. (§ 30809.)

As we have noted, the Commission has 12 voting members, who are appointed in the following manner: the Governor selects 4 members (2 from the public at large, 1 from a designated north coast region of the state, and 1 from the south central coast region); the Speaker of the Assembly selects 4 members (2 from the public at large, 1 from the central coast region, and 1 from the San Diego coast region); and the Senate Committee on Rules selects 4

members (2 from the public at large, 1 from the north central coast region, and 1 from the south coast region). (§§ 30301, subds.(e), (f), 30301.5.) Except for appointments from the public at large, the selections must be made from a list established by local government officials. (§ 30301.2.) Members of the Commission serve two-year terms at the pleasure of their appointing authority. (§ 30312.)

Marine Forests is a nonprofit corporation whose purpose is the development of an experimental research program for the creation of marine forests to replace lost marine habitat. After incorporating in 1986, Marine Forests planted its first experimental marine forest on a sandy plain near Newport Harbor in Orange County, California. The marine forest is made of various materials, including used tires, plastic jugs, and concrete blocks.

In June 1993, the Commission opined that Marine Forests's experiment was a coastal zone development requiring a permit under the Coastal Act. The Commission denied Marine Forests's application for an after-the-fact permit, and in October 1999, it issued a Notice of Intent to Commence Cease and Desist Order Proceedings. After a hearing, the Commission issued a cease and desist order for Marine Forests's experimental site. The order was stayed as the result of Marine Forests's lawsuit.

Marine Forests's complaint included a cause of action for injunctive relief on the ground that the Commission did not have the authority to issue cease and desist orders. Marine Forests claimed that the Commission lacked such authority because the mechanism by which the majority of its voting members are appointed violates the separation of powers doctrine.

The parties filed cross-motions for summary adjudication of Marine Forests's separation of powers cause of action based on stipulated facts. Marine Forests contended, and the Commission disputed, that the Commission's activities violate the separation of powers clause in article III, section 3 of the California Constitution and the appointments clause in article V, section 1.

According to Marine Forests, the statutory method for appointing the Commission's voting members gives the legislative branch of state government control of the majority of the voting members of the Commission, which impermissibly interferes with the executive branch's constitutional authority to execute the laws. Marine Forests contends that, because of this legislative control, the Commission can perform policymaking functions but should not be permitted to exercise executive or quasi-judicial functions.

The trial court agreed with Marine Forests and granted its motion for summary adjudication and request for injunctive relief. The court ruled that the power of the Senate Committee on Rules and the Speaker of the Assembly to appoint the majority of the Commission's voting members and to remove them at will effectively renders the Commission a "legislative agency" because the Commission is not subject to the control of the executive branch. Accordingly, the court enjoined the Commission from granting, denying, or conditioning permits or from issuing cease and desist orders because such actions by a legislative body violate the separation of powers clause of the California Constitution. The court stayed enforcement of its order and enforcement of the Commission's cease and desist order pending appellate review of the constitutional issue.

The Commission's appeal involves a constitutional challenge and a pure question of law. Thus, we apply a de novo standard of review. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799-801.

DISCUSSION

I

Article III, section 3 of the California Constitution states: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

"The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch. [Citations.] '"The courts have long recognized that [the] primary purpose [of the . . . doctrine] is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government."' [Citations.] To serve this purpose, courts '"have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."' [Citations.]" (*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 297 (hereafter *Carmel Valley*).)

However, the separation of powers doctrine recognizes that the three branches of government are interdependent. Accordingly, "it permits actions of one branch that may 'significantly affect those of another branch' [citation]" as long as there is no material impairment of the other branch's core functions. (*Carmel Valley, supra*, 25 Cal.4th

at p. 298.) "'The purpose of the doctrine is to prevent one branch of government from exercising the *complete* power constitutionally vested in another [citation]; it is not intended to prohibit one branch from taking action properly within its sphere that has the *incidental* effect of duplicating a function or procedure delegated to another branch.' [Citation.]" (*Id.* at p. 298, orig. italics.)

II

"In general it may be said that it is for the Legislature to make public policy and for the executive to carry out the policy established by the Legislature. In practice the complexity of public business necessitates that many of the functions of government be accomplished by administrative agencies. [Citation.]" (*California Radioactive Materials Management Forum v. Department of Health Services* (1993) 15 Cal.App.4th 841, 870 (hereafter *Radioactive Materials*); disapproved on another point in *Carmel Valley, supra*, 25 Cal.4th at p. 305, fn. 5.)

There can be no doubt that "[a]dministrative agencies are part of the executive branch of government. [Citation.]" (*Radioactive Materials, supra*, 15 Cal.App.4th at p. 870.)

And there can be no doubt that the Commission exercises executive powers.

For one thing, it has been given the authority to "adopt or amend, by vote of a majority of the appointed membership thereof, rules and regulations to carry out the purposes and provisions of [the Coastal Act]. . . ." (§ 30333.) Such authority constitutes "substantive lawmaking." (*Yamaha Corp. of America v. State Bd. of Equalization*

(1998) 19 Cal.4th 1, 10.) Because the Legislature "may make no law except by statute and may enact no statute except by bill" (Cal. Const., art. IV, § 8), it has no power to make law by regulation. Hence, the authority to adopt and amend rules and regulations to carry out the purposes and provisions of the Coastal Act represents the delegation of the Legislature's lawmaking power to an executive agency. (*Yamaha Corp. of America v. State Bd. of Equalization, supra*, 19 Cal.4th at pp. 10-11.)

The Commission has other duties and powers that are executive in nature. As we have noted, it has the authority to contract with private or governmental agencies for the performance of any work or services that cannot be performed satisfactorily by the Commission's employees. (§ 30334.) It also has authority to investigate and to determine what, if any, action should be taken against any person or governmental agency that has undertaken, or is threatening to undertake, any action within the jurisdiction of the Commission. (§ 30809.) Other duties of the Commission include reviewing the coastal programs of local governments for compliance with the Coastal Act; the Commission has the authority to refuse to certify those plans if they do not conform with policies specified in the Coastal Act. (§§ 30510-30514.) These duties in the interpretation and implementation of the Coastal Act are the very essence of the power to execute the law. (*Bowsher v. Synar* (1986) 478 U.S. 714, 733 [92 L.Ed.2d 583, 600].)

In executing the Coastal Act, the Commission also grants and denies permits, issues cease and desist orders, and performs other review functions (§§ 30600, 30601-30627, 30809-30811), all of which are exercises of quasi-judicial power. (*Yost v. Thomas* (1984) 36 Cal.3d 561, 572; *City of Coronado v. California Coastal Zone Conservation*

Com. (1977) 69 Cal.App.3d 570, 574.) An administrative agency may exercise quasi-judicial powers if (1) the exercise of such power is incidental to, and reasonably necessary to accomplish, a function or power properly exercised by that agency, and (2) the essential judicial power remains ultimately in the courts through review of the quasi-judicial determinations. (*Bradshaw v. Park* (1994) 29 Cal.App.4th 1267, 1275; *In re Danielle W.* (1989) 207 Cal.App.3d 1227, 1236.) Therefore, assuming the requisite judicial review exists, it generally is appropriate for an administrative agency to exercise quasi-judicial powers because this is incidental to, and reasonably necessary to effectuate, the agency's executive power to implement and execute the law. But this is an executive power to be exercised in aid of the agency's executive functions; it is not a legislative power.

III

The Commission contends that the California Constitution does not prohibit the Legislature from appointing members of an executive branch agency; therefore, in the Commission's view, the fact that the Speaker of the Assembly and the Senate Committee on Rules appoint the majority of the Commission's voting members does not violate the separation of powers doctrine stated in article III, section 3 of the California Constitution.

The Commission relies in part upon the California Constitution of 1849, which stated in pertinent part: "All officers whose election or appointment is not provided for by this Constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed as the Legislature may direct." (Former art.

XI, § 6.) When the Constitution was redrafted in 1879, this provision was retained in former article XX, section 4. It was interpreted as giving the Legislature both the power to establish new offices in addition to those provided for in the Constitution and the power to declare the manner in which non-constitutional officers shall be chosen. This latter power included not only the ability to delegate the duty of appointment to some other person or body, but also the Legislature's ability to make the appointment in question itself. (*Ex Parte Gerino* (1904) 143 Cal. 412, 414; *People v. Freeman* (1889) 80 Cal. 233, 235-236; *People v. Langdon* (1857) 8 Cal. 1, 16.)

Article XX, section 4 of the California Constitution was repealed by Proposition 15 in the general election of November 3, 1970. Noting that the repealed provision "apparently was intended during the early days of statehood to confirm the power of the Legislature to establish departments and agencies other than those specifically created by the Constitution," the California Constitution Revision Commission concluded: "Since there is nothing elsewhere in the Constitution restricting the now accepted inherent power of the Legislature to establish new offices, agencies, and departments, this provision is constitutionally unnecessary."[1] The ballot pamphlet stated that the repeal of this provision would place the subject matter of the deleted matter under legislative control through the enactment of statutes.

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[1] We grant the Commission's request for judicial notice of a portion of the ballot pamphlet and the Report of the California Constitution Revision Commission concerning the repeal of former article XX, section 4, and a portion of the ballot pamphlet concerning the repeal of former article XX, section 16. (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 277, fn. 4.)

The enactment of a statute replacing former section 4 of article XX was unnecessary in light of Government Code section 1300, which was passed in 1943. (Stats. 1943, ch. 134, § 1300, p. 960.) It provides: "Every officer, the mode of whose appointment is not prescribed by law, shall be appointed by the Governor."

Accordingly, despite the repeal of former section 4 of article XX, the Legislature retains the power to enact legislation creating new agencies, and the power of appointment that is not regulated by the California Constitution may be regulated by statute.[2] If the law so prescribes, the appointment power may be exercised by the Legislature. Only when the appointing authority is not otherwise prescribed by law does this power reside in the Governor.[3]

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[2] In contrast, article 2, section 2, clause 2 of the United States Constitution provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

[3] Amicus curiae, Signal Landmark and Hearthside Homes (Signal), argues that the Legislature no longer has the power to make appointments because the constitutional provision regarding this power was repealed. Accordingly, Signal construes Government Code section 1300 as granting to the Governor the power of appointment previously held by the Legislature. We disagree. Restrictions on the authority of the Legislature must be narrowly construed, and limitations that are not established expressly or by necessary implication cannot be imposed. (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180.) The history of the repeal of former section 4 of article XX, set forth in the body of this opinion, indicates that the People did not intend to deprive the Legislature of the ability to reserve the power of appointment to

(Continued on following page)

The Commission points out that, where there is no set term of office, the power to appoint an officer includes the power by the appointing authority to remove the officer at will. (Citing Gov. Code, § 1301 ["Every office, the term of which is not fixed by law, is held at the pleasure of the appointing power"]; *Brown v. Superior Court* (1975) 15 Cal.3d 52, 55; *People v. Hill* (1857) 7 Cal. 97, 102.) It follows, the Commission argues, that because the Legislature has the authority to enact statutes permitting it to appoint administrative agency officers and to provide for their removal at the pleasure of the appointing party, the Legislature's exercise of such power with respect to the Commission does not violate the separation of powers doctrine. We disagree.

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itself. Moreover, as the Supreme Court repeatedly has stated, "we do not look to [California's] Constitution to determine whether the legislature is authorized to do an act, but only to see if it is prohibited. In other words, unless restrained by constitutional provision, the legislature is vested with the whole of the legislative power of the state." (*Fitts v. Superior Court* (1936) 6 Cal.2d 230, 234; accord, *Collins v. Riley* (1944) 24 Cal.2d 912, 916; see also *California Housing Finance Agency v. Patitucci* (1978) 22 Cal.3d 171, 175 ["the California Constitution, unlike its federal counterpart, is a limitation or restriction on the powers of the Legislature, rather than a grant of power to it"].) Hence, the repeal of former section 4 of article XX had no effect on the Legislature's power of appointment because nothing in the California Constitution grants to the Governor the sole or paramount power of appointment or prohibits the Legislature from exercising such power, which is not inherently an executive function. (*People v. Freeman*, *supra*, 80 Cal. at pp. 235-236.) Furthermore, Signal has misinterpreted the effect of Government Code section 1300. First, the plain language of section 1300 discloses the Governor does not have a superior right to that of the Legislature to appoint the officers of administrative agencies. Second, section 1300 is a statutory provision, and it is within the prerogative of the Legislature to alter its application through a subsequently enacted and more specific statute.

The fact the legislative branch has the power to appoint executive branch officers and to provide for their removal at will does not mean that this authority is without limits. Nor does it mean that the Legislature's exercise of its power in structuring the appointment of the Commission's members does not violate the separation of powers doctrine.

For example, although Congress had the authority to create a Board of Review when relinquishing to an executive agency the operating authority over federal property, it violated the separation of powers doctrine by specifying that the Board of Review would consist of nine Members of Congress who would have veto authority over decisions of the executive agency. (*MWAA v. CAAN* (1991) 501 U.S. 252, 255, 263, 270-271, 277 [115 L.Ed.2d 236, 245-246, 251, 255-256, 259].)

A different example may be found in *Obrien v. Jones* (2000) 23 Cal.4th 40, a case in which the California Supreme Court was asked to determine whether a statute permitting the Governor, the Senate Committee on Rules, and the Speaker of the Assembly to appoint three of the five judges of the State Bar Court Hearing Department violated the separation of powers clause of our state Constitution because "the power to discipline licensed attorneys in this state is an expressly reserved, primary, and inherent power of [the Supreme Court]." (*Id.* at p. 48.)

The Supreme Court did not simply say that the Legislature had the power to make appointments or to dictate the appointing authority and, consequently, there was no constitutional violation. Rather, the relevant question was whether the appointment mechanism materially impaired the court's primary and ultimate authority

over the attorney admission and discipline process. (*Obrien v. Jones, supra*, 23 Cal.4th at pp. 43-44, 50.)

The Supreme Court noted that all applicants for appointment as a State Bar Court judge must be screened and evaluated in light of criteria specified by statute and rules of the Supreme Court (*Obrien v. Jones, supra*, 23 Cal.4th at p. 51), and must be found qualified by the Applicant Evaluation and Nominating Committee, whose members are appointed by the Supreme Court. (*Id.* at pp. 52, 53.) And once appointed, the State Bar Court judges "are subject to discipline by [the Supreme Court] on the same grounds as a judge of a court of record in this state." (*Id.* at p. 46.) In addition, findings and recommendations of State Bar Court judges are subject to independent review by the Review Department, whose members are appointed by the Supreme Court (*id.* at pp. 54, 55), and the Review Department has the broad authority to accept or reject the findings and recommendations of the hearing judges. (*Ibid.*) Furthermore, those findings and recommendations must then be presented for the Supreme Court's consideration. (*Id.* at p. 55.)

Hence, there is no separation of powers violation because the appointment mechanism is subject to sufficient judicially controlled protective measures to ensure that the appointments do not impair the Supreme Court's authority. (*Obrien v. Jones, supra*, 23 Cal.4th at pp. 44, 55, 57.) "As in the past, all hearing judges [are] subject to the primary authority and supervision of [the Supreme Court]. (*Id.* at p. 55.)

Likewise, the relevant question with respect to the Commission is whether the appointment mechanism in sections 30301 and 30312 materially infringes upon the

inherent authority of that executive branch agency, i.e., undermines the authority and independence of the agency, as Marine Forests alleges, or whether there are sufficient safeguards preventing such an infringement.

IV

In contrast to the appointments to the State Bar Court, the statutory scheme regarding the Commission gives the Legislature virtually unfettered discretion in appointing 8 of the 12 voting members of the Commission. (§§ 30301, 30301.2.) Other than the requirement that 4 of the 8 members appointed by the Legislature must be local elected officials, the scheme provides no standards or procedures for evaluating the qualifications of prospective appointees. Although those appointments are made from a list of nominees provided by the county and city governments within the regions, the appointing authorities have the power to reject all of the nominees on the list and to require the local governments to provide additional nominees. (§ 30301.2.) The only qualification concerning the appointment of public members is that the appointing authorities "shall make good faith efforts to assure that their appointments, as a whole, reflect, to the greatest extent feasible, the economic, social, and geographic diversity of the state." (§ 30310, subd. (b).) And there is no requirement that appointees be found qualified by a review committee controlled by the executive branch.

Even more significant is the fact that, unlike State Bar Court judges who serve set terms and are subject to removal on the same grounds applicable to a judge of a court of record, pursuant to proceedings under the exclusive control of the judiciary (*Obrien v. Jones, supra*, 23

Cal.4th at p. 46), the Commission members who are appointed by the Legislature serve at the pleasure of the appointing authority and, thus, can be removed and replaced at any time and for any reason, or for no reason at all. (§ 30312, subd. (a).)

There are no safeguards and checks which would serve to ensure that the Commission is under the primary authority and supervision of the executive branch. Rather, the retention by the Legislature of the virtually unfettered power of appointment, and wholly unfettered power of removal, over two-thirds of the voting members of the Commission serves to ensure that the Commission is under the control of the Legislature.

This is not merely a paper conclusion. It is a political reality. On motion for summary judgment, the Commission stipulated that "[the Commission] is not appointed by the Governor and is not subject to the Governor. [It] has been placed by the Legislature in the Resources Agency but is not governed by that agency." Thus, the Commission regards itself as being free of executive branch authority and supervision. Of course, whether the Commission is free of executive branch supervision and control is a legal, not a factual, question. But the Commission's view of its own position in government serves to confirm our legal conclusion that the Commission is subject to the control of the Legislature rather than executive branch of government. And this control enables the legislative branch concomitantly to control the Commission's function of implementing the Coastal Act (§ 30330), which function is the very essence of the executive power.

It is true "[t]he Legislature may, by statute, exercise broad control over the policies to be implemented and the

ways and means of their accomplishment. However, acts which are done to carry out the policies and purposes already declared by the Legislature are not a legislative function." (*Radioactive Materials, supra*, 15 Cal.App.4th at p. 871.) The Legislature cannot exercise direct supervisorial control over the performance of the duties of an executive officer in his or her execution of the laws; rather, it can exercise control only indirectly by dictating the manner of execution of the laws via the enactment of legislation. (See *Carmel Valley, supra*, 25 Cal.4th at p. 304; *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 63; *Radioactive Materials, supra*, 15 Cal.App.4th at p. 873; cf. *Bowsher v. Synar, supra*, 478 U.S. at pp. 733-734 [92 L.Ed.2d at p. 601].)

Accordingly, by retaining the unilateral power to remove at will the majority of the voting members of the Commission, the legislative branch impermissibly controls the Commission's executive function of implementing the Coastal Act in violation of the separation of powers clause of California's Constitution.

Other jurisdictions that have examined similar issues have reached conclusions consistent with ours. For example, the Kansas Supreme Court held that its state's separation of powers doctrine was violated where legislators controlled an administrative body in the performance of its executive functions. (*State v. Bennett* (1976) 219 Kan. 285, 298, [547 P.2d 786, 797-798].) In contrast, the Louisiana Supreme Court determined that its state's separation of powers doctrine was not violated by legislative appointment of the majority of members of a board that performed executive functions because, unlike in the present case, the board members could be removed only for cause and there was no continuing relationship between the

legislative branch and the appointees. (*State Board of Ethics v. Green* (1990) 566 So.2d 623, 625-626.)

As pointed out by the United States Supreme Court in *Bowsher v. Synar, supra*, 478 U.S. 714 [92 L.Ed.2d 583] (hereafter *Bowsher*), if the majority of an executive agency's voting members (i.e., those who implement the duties of the agency) are removable at the pleasure of members of the legislative branch, this impermissibly interferes with the executive power to see that the law is safely executed and to supervise the official conduct of executive officers. (*Id.* at pp. 726-727 [92 L.Ed.2d at pp. 596-597].)

Bowsher concerned the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. § 901 et seq.), which required the United States Comptroller General to identify budget reductions that the President was required to carry out when federal deficit spending exceeded a certain limit. (*Bowsher, supra*, 478 U.S. at pp. 717-718 [92 L.Ed.2d at p. 591].) The Supreme Court noted that, under the United States Constitution, Congress may not remove an officer charged with executive duties, such as the Comptroller General, except by impeachment. (*Id.* at p. 723 [92 L.Ed.2d at p. 594].) Yet Congress had retained the power to remove the Comptroller General virtually at will (*id.* at pp. 720, 728-732 [92 L.Ed.2d at pp. 592, 597-600]), which had the effect of making the officer answerable only to Congress and vesting Congress with control of the execution of the laws in violation of the separation of powers doctrine. (*Id.* at pp. 726-727 [92 L.Ed.2d at pp. 596-597].) Because Congress retained removal authority over the Comptroller General, he could not be entrusted with executive powers. (*Id.* at pp. 732 [92 L.Ed.2d at p. 600].)

The Supreme Court explained: "To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress. This kind of congressional control over the execution of the laws . . . is constitutionally impermissible." (*Bowsher, supra*, 478 U.S. at pp. 726-727 [92 L.Ed.2d at pp. 596-597].) "[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly – by passing new legislation." (*Id.* at pp. 733-734 [92 L.Ed.2d at p. 601].)

Thus, *Bowsher* "stands for the proposition that Congress may limit the discretion vested in the executive by enacting a statute circumscribing that discretion, but it may not control the *exercise* of the discretion actually vested by statute in the executive by retaining the unilateral power of removal." (*Carmel Valley, supra*, 25 Cal.4th at p. 305.) This commonsense reasoning of *Bowsher* applies equally to the separation of powers clause of California's Constitution.[4]

Section 30312 gives the Speaker of the Assembly and the Senate Committee on Rules virtually unfettered authority over the appointment of a majority of the Commission's

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[4] The California Supreme Court noted that *Bowsher* "might cast doubt" on the Legislature's authority to enact a statute vesting the legislative branch with the unilateral power to remove an agency director from office by joint resolution, but the court "put [] aside" the question of whether it was bound to adopt the reasoning of the United States Supreme Court in interpreting the California Constitution's separation of powers clause. (*Carmel Valley, supra*, 25 Cal.4th at p. 305.)

members, and wholly unfettered power to remove those members at the will of the Legislature. The presumed desire of those members to avoid being removed from their positions creates an improper subservience to the legislative branch of government. And the scheme contains no safeguards or checks to ensure that those Commission members are subject to the primary authority and supervision of the executive branch. Consequently, this statutory scheme gives the Legislature excessive control over the Commission in the exercise of powers, and in the execution of duties, that are executive in character.

The result is that the legislative branch not only has the ability to declare the law, but also to control the Commission's execution of the law and its exercise of quasi-judicial powers via the Legislature's control of the majority of the Commission's members. This contravenes the primary purpose of the separation of powers doctrine, which "'"is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government."' [Citations.]" (*Carmel Valley, supra*, 25 Cal.4th at p. 297.)

V

The Commission contends that the holding in *Bowsher, supra*, 478 U.S. 714 [92 L.Ed.2d 583] is distinguishable and inapplicable in the present case because, under the United States Constitution, Congress has no power to appoint executive officers and no power to remove them other than by the impeachment process (U.S. Const., art. II, § 2, cl.2, § 4), whereas the California Constitution does not preclude the Legislature from making appointments to

executive agencies or exercising the concomitant power of removal from office.

This is not a critical distinction. *Bowsher* did not hold that the separation of powers doctrine was violated simply because Congress lacked the constitutional authority to remove an executive officer except by impeachment. The doctrine was violated because Congress's ability to remove the Comptroller General virtually at will interfered with the execution of the laws, a matter plainly outside the Congressional sphere. The high court noted that, because the structure of the Constitution does not permit Congress to execute the laws, Congress could not grant to an officer under its control what it did not possess. (*Bowsher, supra*, 478 U.S. at p. 726 [92 L.Ed.2d at p. 596].) What is of particular importance to the resolution of the appeal before us is the high court's conclusion that "[t]o permit the execution of the laws to be vested in an officer answerable only to [the legislative branch] would, in practical terms, reserve in [that branch] control over the execution of the laws." (*Ibid.*) This commonsense principle applies with equal force to our state separation of powers determination that the appointment mechanism for the Commission, an executive branch agency, materially impairs one of its core functions, namely execution of the law.

The Commission also argues that Marine Forests's constitutional challenge is infirm because it has not presented an "as applied" challenge or made any factual allegations that the Legislature has directed or dictated the actions of its appointees; rather, it has made a facial challenge and thus must demonstrate that the statute's provisions "'inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.'"

(Quoting *Pacific Legal Foundation v. Brown, supra*, 29 Cal.3d at p. 181.)

However, Marine Forests does not need to demonstrate that the legislative appointing authorities have attempted to interfere with the Commission members' execution of the Coastal Act. It is the Commission members' presumed desire to avoid removal—by pleasing their legislative appointing authorities—which creates the subservience to another branch that raises separation of powers problems. (*Bowsher, supra*, 478 U.S. at p. 727, fn. 5 [92 L.Ed.2d at p. 597]; *MWAA v. CAAN, supra*, 501 U.S. at p. 269, fn. 15, [115 L.Ed.2d at p. 254].) As noted previously, "[t]o permit the execution of the laws to be vested in an officer answerable only to [the legislative branch] would, in practical terms, reserve in [that branch] control over the execution of the laws." (*Bowsher, supra*, 478 U.S. at p. 726 [92 L.Ed.2d at p. 596].) Thus, this is not simply a hypothetical problem as the Commission suggests.[5]

The Commission intimates that there is no problem with the Coastal Act's appointment mechanism because the Governor signed, and therefore approved of, the legislation giving the legislative branch the ability to appoint and remove at will the majority of the voting members of the Commission. But "the Governor can no more concede executive power to a legislative committee than a committee can be permitted to usurp it. [Citations.]

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[5] Amici curiae ask us to take judicial notice of evidence they submitted as purported examples of the Legislature's interference with Commission members' execution of their duties. The Commission opposes this request on various grounds. Because we have concluded that Marine Forests need not demonstrate that any actual interference has occurred, the request for judicial notice is denied.

And the Governor's consent to an unlawful legislative act does not validate the act. [Citations.]" (*Radioactive Materials, supra*, 15 Cal.App.4th at pp. 873-874.) Hence, the Governor's approval of an appointment structure that interferes with the executive power does not rectify its constitutional infirmity.

Pointing out administrative agencies in which fewer than a majority of the members are appointed by the Governor or in which members are removable at will, the Commission argues that this demonstrates there is nothing unique about the setup of the Commission and, thus, there is no separation of powers violation. However, the Commission does not point to any administrative agency that (1) performs executive functions as opposed to merely gathering information and making policy recommendations, which are incidental to legislative functions, and (2) for which the Legislature appoints a majority of the members and may remove them at will. In any event, even if other administrative agencies exist with an appointment structure similar to that of the Commission, this does not establish there is no separation of powers violation in the present case.

We note that in *Parker v. Riley* (1941) 18 Cal.2d 83, the California Supreme Court concluded the fact that the Commission on Interstate Cooperation was comprised of five members of the Senate Committee on Interstate Cooperation, five members of the Assembly Committee on Interstate Cooperation, and five members appointed by the Governor did not violate the separation of powers provisions of the California Constitution, or violate the constitutional prohibition against legislators holding other offices or positions of trust. (*Id.* at pp. 85, 87-90.) This was so because the duties imposed on said commission were

incidental and ancillary to the lawmaking functions of the Legislature. (*Id.* at pp. 88-89.) However, the Supreme Court warned "[i]t must not be assumed . . . that legislative activities may be expanded indefinitely through the creation of separate agencies responsible primarily to the legislature. This sort of expansion would soon lead to a legislative usurpation of power incompatible with the proper exercise of its lawmaking function." (*Parker v. Riley, supra*, 18 Cal.2d at p. 88.)

The appointment mechanism specified in the Coastal Act is just such an impermissible expansion. It materially impairs the executive power's ultimate authority over the execution of the laws because it allows the legislative branch to retain majority control over the Commission's implementation of the Coastal Act, and the Commission's duties are not limited to those that are incidental and ancillary to the lawmaking functions of the legislature.

Because the majority of the Commission's voting members are controlled by the legislative branch, the separation of powers doctrine precludes the Commission from being entrusted with the exercise of executive powers or of quasi-judicial powers that are incidental to the executive function of implementing the law. (Cf. *Bowsher, supra*, 478 U.S. at pp. 726, 732 [92 L.Ed.2d at p. 596-597, 600].) Accordingly, the trial court acted properly in enjoining the Commission from granting, denying, or conditioning permits, and from issuing and hearing cease and desist orders.[8]

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[8] Amicus curiae briefs have been filed by numerous entities. To the extent those briefs raise arguments that are not presented in Marine Forests's petition for writ of mandate, or raise arguments that were not

(Continued on following page)

VI

It is appropriate here to emphasize that our legal conclusion—that the process for appointing voting members of the Commission violates the separation of powers doctrine—is limited to the specific facts of this case, where a majority of the Commission's voting members are appointed by the legislative branch and *may be removed at the pleasure of the legislative branch* and there are no safeguards protecting against the Legislature's ability to use this authority to interfere with the Commission members' executive power to execute the laws. We express no opinion regarding the propriety of legislative appointments to administrative agencies under circumstances different than presented here.

We also note that Marine Forests made a timely separation of powers objection and pursued its remedies in a timely manner. (See *Moffat v. Moffat* (1980) 27 Cal.3d 645, 656 [the waiver rule may preclude a party from making a collateral attack on proceeding in which the party participated without objection]; *Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 950-951 [same]; see also *Ryder v. United States* (1995) 515 U.S. 177, 182-183 [132 L.Ed.2d 136, 143] ["one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred"].)

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tendered in the trial court, we decline to address them. (*California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1274-1275 [amicus curiae must accept the issues urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered].)

We need not, and do not, consider the rights and interests of other parties to prior actions of the Commission.

DISPOSITION

The judgment is affirmed. The trial court is directed to vacate the stay that it issued.

SCOTLAND, P.J.

We concur:

DAVIS, J.

ROBIE, J.

APPENDIX C

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

MARINE FORESTS SOCIETY et al., Plaintiffs and Respondents, v. CALIFORNIA COASTAL COMMISSION et al., Defendants and Appellants.	C038753 (Super. Ct. No. 00AS00567) ORDER MODIFYING OPINION AND DENYING REHEARING; NO CHANGE IN JUDGMENT (Filed Jan. 23, 2003)

THE COURT:

It is ordered that the opinion filed in this case on December 30, 2002, be modified in the following particulars:

1. At the end of the first paragraph on page 15, line 12, after the sentence ending "We disagree" add the following new footnote:

Relying on *Brown v. Superior Court*, *supra*, 15 Cal.3d 52 and other cases cited in their briefs and petition for rehearing, the Commission claims that an "extensive body of law addressing the removal question" has "reaffirmed an appointing authority's power of removal and blessed a 'politically responsive' appointment scheme that is virtually identical to the one [used in appointing the voting

members of the Commission]." However, the Commission fails to recognize that none of the cases upon which it relies concerned a separation-of-powers challenge to the Legislature's ability to remove its appointees at will, let alone to its ability to remove a majority of an executive agency's officers at will. "Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered." (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2; accord, *People v. Albritton* (1998) 67 Cal.App.4th 647, 655-656.)

2. On page 25, line 6, after the citation "[115 L.Ed.2d at p. 254].)" add the following new footnote:

The Commission claims this presumption, akin to that recognized by the United States Supreme Court in *Bowsher*, *supra*, 478 U.S. at page 727, fn. 5 [92 L.Ed.2d at p. 597], is erroneous because it "conflicts with California's legal presumption, not addressed by the opinion, that public officials will comply with the law." (Citing Evid. Code, § 664 ["It is presumed that official duty has been regularly performed. . . ."].)

The Commission overlooks that there is a similar presumption with respect to federal officials which, thus, applied in *Bowsher*. (*United States v. Chemical Foundation* (1926) 272 U.S. 1, 14-15 [71 L.Ed. 131, 142-143] ["The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties"]; *United States v. State of Washington* (9th Cir. 1956) 233 F.2d 811, 816 [there is a presumption that "the ordinary course of business was followed and that the law was obeyed; also that official

duty was regularly and faithfully performed"]; *La Porte v. Bitker* (7th Cir. 1944) 145 F.2d 445, 447 ["a presumption of regularity . . . must be accorded the acts of a government official"].)

In light of significant political influences that affect the decisionmaking process of the Commission, and the broad discretion possessed by members of the Commission in executing the law and making quasi-judicial determinations, we would be naive, indeed, to conclude that the legal presumption of Evidence Code section 664 has not been rebutted by another realistic, commonsense presumption—members of the Commission, who are subject to removal at will by the Senate Committee on Rules and the Speaker of the Assembly, will "'desire to avoid removal by pleasing [their appointing authorities], which creates the here-and-now subservience to another branch that raises separation-of-powers problems.'" (*Bowsher, supra*, 478 U.S. at p. 727, fn. 5 [92 L.Ed.2d at p. 597].)

3. These modifications require renumbering subsequent footnotes.

[There is no change in the judgment.]

Appellant's petition for rehearing is denied.

FOR THE COURT:

SCOTLAND, P.J.

DAVIS, J.

ROBIE, J.

APPENDIX D

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IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

MARINE FORESTS SOCIETY, a nonprofit corporation; and RODOLPHE STREICHENBERGER, an individual taxpayer,

Plaintiffs,

v.

CALIFORNIA COASTAL COMMISSION, a state agency; CALIFORNIA DEPARTMENT OF FISH AND GAME, a state agency; PETER DOUGLAS, an individual; SUSAN HANSCH, an individual; CHRIS KERN, an individual;

Case No.: 00AS00567

UNDISPUTED STIPULATED FACTS FOR SUMMARY ADJUDICATION ON FIRST CAUSE OF ACTION

(Filed Feb. 15, 2001)

DENNIS BEDFORD, an individual; and DOES 1 through 50, inclusive,

Defendants,

CALIFORNIA STATE LANDS COMMISSION, a state agency,

Defendant and Indispensable Party.

BACKGROUND

1. Inasmuch as the facts are not really in dispute, the parties believe that the First Cause of Action (Separation of Powers) can be fully and expeditiously resolved on joint motions for summary adjudication based on stipulated facts. As a result, the parties entered into a stipulation which was approved by the Honorable John R. Lewis on December 13, 2000. The parties entered into this stipulation of facts pursuant to Judge Lewis December 13, 2000 order.

2. It is plaintiffs' position that defendants' activities are in violation of the provisions of Article III, § 3, the separation of powers, and Article V, § 1, appointments clauses of California's Constitution. Defendants argue that an administrative agency being delegated quasi-executive and quasi-judicial powers is commonplace in California administrative law and that plaintiffs' position is without merit.

3. Plaintiff Marine Forests Society ("MFS") is a nonprofit corporation whose stated purpose is the development of an experimental research program for the creation of marine forests to replace lost marine habitat.

4. Plaintiff Rodolphe Streichenberger is the founder, President and Chief Executive Officer of MFS.

5. Defendant California Coastal Commission ("CCC") is an agency of the State of California.

6. Defendant Peter Douglas is the Executive Director of CCC and an officer thereof.

7. Defendant Susan Hansch is A Deputy Director and an officer and employee of the CCC.

8. Defendant Chris Kern is an officer and employee of CCC

9. Sometime after its incorporation in 1986, MFS planted its first experimental marine forest on a sandy plain near Newport Harbor in Orange County.

10. In approximately June, 1993, CCC staff formed its opinion that the MFS experiment was unpermitted development under the California Coastal Act.

11. CCC regularly exercises its statutory authority to grant or deny coastal development permits, permits that must be obtained before "development" can occur in the coastal zone.

12. On April 9, 1997, CCC denied MFS's application for an after-the-fact permit for MFS' experimental site.[1]

13. On October 28, 1999, CCC's Executive Director issued a Notice of Intent to Commence Cease and Desist Order Proceedings.

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[1] An after-the-fact permit is a permit issued to an applicant for a development that legally should have been constructed with a permit, but was not.

14. The hearing on the proposed cease and desist order was scheduled for February 16, 2000.

15. In response to the filing of this lawsuit, CCC postponed the hearing on the cease and desist order until this Court could act on MFS's request for a preliminary injunction.

16. This Court denied MFS's request for a preliminary injunction.

17. CCC held a hearing on May 9, 2000, and issued a cease and desist order to MFS and Rodolphe Streichenberger for MFS' experimental site.

18. In the related matter of ***Marine Forests Society, et al. v. California Coastal Commission***, Sacramento County Superior Court Case No. 00AS03293, enforcement of CCC's cease and desist order was stayed by Judge Talmadge Jones on July 18, 2000, in response to a lawsuit filed by MFS challenging the cease and desist order. A mandate hearing was conducted on December 15, 2000, and the decision is pending.

SEPARATION OF POWERS CAUSE OF ACTION

19. CCC's voting membership consists of 12 members.

20. Of CCC's 12 voting members, the Governor appoints four (two public and two regional representatives), the Senate Rules Committee appoints four (two public and two regional) and the Speaker of the Assembly appoints four (two public and two regional).

21. Each member has a two-year term, but serves at the will of the appointing power.

22. CCC is not appointed by the Governor and is not subject to the Governor. CCC has been placed by the Legislature in the Resources Agency but is not governed by that agency. Recently, a controversy arose relating to the role, if any, that CCC should have in relationship to the Department of Fish and Game in designing Habitat Conservation Plans that fall within both agencies' jurisdictions. (*See* Exh. 1, Letter from Mary D. Nichols to Ms. Sara Wan, dated October 11, 2000; Exh. 2, *Los Angeles Times* article, dated October 13, 2000.)

DATED: February 7, 2001

BILL LOCKYER, Attorney General
of the State of California
RICHARD FRANK, Chief Assistant
Attorney General
J. MATTHEW RODRIQUEZ,
Senior Assistant Attorney General
LISA TRANKLEY, Deputy Attorney
General

By: /s/ Lisa Trankley
LISA TRANKLEY
Deputy Attorney General
Attorneys for Defendants

DATED: February 8, 2001

RONALD A. ZUMBRUN
THE ZUMBRUN LAW FIRM

By: /s/ Ronald A. Zumbrun
RONALD A. ZUMBRUN
Attorneys for Plaintiffs

EXHIBIT 1

The Resources Agency

Gray Davis
Governor

[LOGO]

Mary D. Nichols
Secretary

of California
October 11, 2000

[Address And Description Omitted In Printing]

Ms. Sara Wan Chair,
and All Commissioners
California Coastal Commission
45 Fremont Street, Ste. 2000
San Francisco, CA 94105

Dear Chairman Wan and Members of the Commission,

I regret that I was unable to be at your meeting today because my attendance was required at the Governor's Energy Green Team in Sacramento.

I understand that you took up for discussion during the Executive Director's Report a matter that was presented for informational purposes only, namely the letter that Peter Douglas sent to Mr Joseph Uravitch, Chief of the Office of Ocean and Coastal Resource Management, Coastal Programs Division.

In that letter your Executive Director requests "OCRM's concurrence in the Commission's determination that the proposed addition to the CCMP's list of federal permits constitutes a routine program change of the CCMP [California Coastal Management Program.]" The federal permit that Mr. Douglas proposes adding is the Section 10(a) incidental take permit issued by the U.S. Fish and Wildlife Service. Based on my reading of the letter, this could involve the Commission reviewing HCPs

and NCCPs in any area that "affects" the Coastal Zone, which arguable could include the entire State.

This new assertion of consistency review authority does not include any proposed criteria for making consistency determinations – an omission that causes grave concern to all who participate in habitat conservation planning.

I received this letter dated Sept 28, 2000 on Oct 3, 2000 as did Robert Hight, Director of the Department of Fish and Game, without any prior consultation. Since that time both of us have also been contacted by various members of the public who have expressed grave concern about the scope and interpretation of Mr. Douglas' assertion of consistency review authority.

I would call to the Commission's attention the fact that as a result of legislative interest and concern about potential conflicts between the California Coastal Act and the Natural Community Conservation Planning (NCCP) Act, the Resources Agency was given a mandate in section 12805.1 of the Government Code in regard to these laws to facilitate "coordination between the Department of Fish and Game and the California Coastal Commission."

While Mr. Douglas' letter on its face purports to address only the issue of federal consistency review over Section 10(a) permits, in fact these permits are based on the very same conservation plans that are the heart of the NCCP Program. Consistency review of Section 10(a) permits is therefore tantamount to review of NCCP plans approved by the Department of Fish and Game. Thus your Executive Director's action obviously raises fundamental questions affecting my jurisdiction over this program.

The process of attempting to resolve these issues pursuant to Section 12805.1 is already underway. I have convened meetings between the staffs of the Department of Fish and Game and the Coastal Commission. By Dec. 1, 2000 I intend to make my recommendations as to how to finally resolve this matter. I would appreciate your cooperation in allowing this process to be completed before any formal requests are made toward changing the CCMP.

I also understand that the Commission requested Mr. Douglas to set up a workshop to educate the members of the Commission about the proposed change in the CCMP. As indicated above this workshop should be scheduled in December, or at some time after my report is available.

Under these circumstances, and given the controversy and the dispute resolution process already underway, I believe it is questionable to treat the proposed change in the State Coastal Plan as "routine." Further it would be premature for the OCRM to act on Mr, Douglas' request without the Commission having given itself and the public the opportunity for full notice and comment.

This issue goes to the heart of the State's efforts to protect our wildlife and habitat. Please advise me of the Commission's proposed course of action on this important matter.

Yours sincerely,

/s/ Mary D. Nichols
Mary D. Nichols
Secretary for Resources

cc: Peter Douglas

EXHIBIT 2

Los Angeles Times. O.C.
Friday, October 13, 2000 A 3 R

Coastal Panel Seeks Stronger Role

■Habitat: Commission defies state's top environmental official in pushing to join in development planning.

By SEEMA MEHTA
TIMES STAFF WRITER

OCEANSIDE – Defying a request by the state's top environmental official, the California Coastal Commission on Thursday voted to push for a role in crafting habitat conversation plans that allow development on fragile lands.

State and federal officials, as well as developers and business leaders, are crying foul, saying the commission's move will disrupt a creative planning process hailed as an ideal way to balance development and protection of natural resources.

Coastal commission involvement would add another layer of bureaucracy and delay for landowners and developers, building industry officials say. There would be "no incentive for the private sector to participate" in habitat plans, said David Smith, general counsel for the Building Industry Assn. of Southern California.

Valerie Nera, director of agriculture and resources for the California Chamber of Commerce, also was dismayed by the vote. "A lot of state and local governments have spent a lot of time putting together habitat conservation plans – some of them have been many years in the making," she said. "It seems like we're going backward now."

Habitat conservation plans, also called HCPs allow developers to set aside large chunks of land in exchange for permission to destroy sensitive habitat elsewhere. One of the first was Orange County's central and coastal 37,000-acre Natural Communities Conservation Plan, a landmark agreement by California, the U.S. Interior Department, environmentalists and landowners – primarily the Irvine Co. – to protect nearly 40 species that are nearing extinction.

The Clinton administration's habitat conservation program has created dozens of land-use plans throughout California, including some that encompass long stretches of coastline.

But the commission has not been involved directly in designing those plans. A Carlsbad habitat conservation plan piqued the commission's concern, leading to a Sept. 28 request from Executive Director Peter Douglas that federal officials consult the agency in every such plan that could affect coastal resources.

[Photograph of Executive Director Peter Douglas Omitted]

"Just because you have an HCP doesn't mean you meet Coastal Act standards," Douglas said, referring to stringent protections in the landmark law passed by voters in 1972. "Our review process is much more rigorous than what those plans are submitted to now. . . . What's being attempted here is cutting the Coastal Act out of the process."

Douglas said consultation already is within the commission's jurisdiction under federal law; formalizing the commission's involvement would merely mean that the

agency would not have to seek consultation rights on a case-by-case basis.

The request is being studied in Washington, with a decision expected by month's end. Thursday's vote upheld the letter's intent and called for a public workshop at a future meeting.

In a strongly worded letter to Douglas, U.S. Fish and Wildlife Service official Michael Spear wrote on Aug. 11 that such a move would "have a chilling effect on applicants' willingness to engage" in the program.

The conflict came to light Wednesday, when discussion of what was billed as a routine item was interrupted by an urgent message from state Resources Secretary Mary Nichols. She urged the commission to withdraw its request to help state and federal officials craft the plans.

On Thursday, the commission appeared ready to comply with Nichols' request – until a handful of commissioners and members of the public accused the agency of bowing to political interference from Sacramento.

"I am in no way going to vote to knuckle under to that type of pressure," said Commissioner Annette Rose, who called the situation "deeply disturbing."

What originally would have been a narrow vote to comply with Nichols' request turned into a unanimous vote to disregard her.

Attempts to reach Nichols were unsuccessful Thursday.

However, in a letter commissioners received after their vote, Nichols wrote that Douglas' request "obviously

raises fundamental questions affecting my jurisdiction over this program." Nichols wrote she would prefer that the commission work with the state Department of Fish and Game on complex habitat conservation plans.

Times staff writer Deborah Schoch contributed to this report.

DECLARATION OF SERVICE
(AG Mailroom)

Case Name: **Marine Forests Society, et al. v. California Coastal Commission**
Sacramento Superior Court Case No.: 00AS00567

I Judy A. Dickey declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On February 15, 2001, I served the attached **UNDISPUTED STIPULATED FACTS FOR SUMMARY ADJUDICATION ON FIRST CAUSE OF ACTION** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail

collection system at the Office of the Attorney General at 1300 I Street, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Ronald A. Zumbrun
The Zumbrun Law Firm
3800 Watt Avenue, Suite 101
Sacramento, CA 95821

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 15, 2001, at Sacramento, California.

Judy A. Dickey	/s/ Judy A. Dickey
Typed Name	Signature

APPENDIX E

Court of Appeal, Third Appellate District – No. C038753
S113466

IN THE SUPREME COURT OF CALIFORNIA
En Banc
(Filed Apr. 9, 2003)

MARINE FORESTS SOCIETY et al.,
Plaintiffs and Respondents,

v.

CALIFORNIA COASTAL COMMISSION et al.,
Defendants and Appellants.

Petition for review GRANTED.

Request for judicial notice granted.

In addition to the issue set forth in the petition for review, the parties are requested to brief the following issues:

(1) Assuming the Commission's decision in the present case is constitutionally defective in the manner stated by the Court of Appeal, what is the appropriate remedy available to Marine Forests Society?

(2) What effect would the holding of the Court of Appeal have on past and other currently pending decisions of the California Coastal Commission?

(3) Does the February 20, 2003 amendment to Public Resources Code section 30312 eliminate the separation-of-powers defect found by the Court of Appeal, or is the

composition of the Coastal Commission still vulnerable to a separation-of-powers challenge?

George
Chief Justice

Kennard
Associate Justice

Baxter
Associate Justice

Werdegar
Associate Justice

Chin
Associate Justice

Brown
Associate Justice

Moreno
Associate Justice

APPENDIX F

The 2004 Governor's Environmental and Economic Leadership Award

Certificate of Recognition

Awarded to

Marine Forests Society

In recognition of meritorious contributions to environmental protection and resource conservation in the State of California

November 2004

APPENDIX G

RONALD A. ZUMBRUN, SBN 32684
JEFFERY B. YAZEL, SBN 210057
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Telephone: (916) 486-5900
Facsimile: (916) 486-5959

Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

MARINE FORESTS SOCIETY, a nonprofit corporation; and RODOLPHE STREICHENBERGER, an individual and taxpayer, Plaintiffs, v. CALIFORNIA COASTAL COMMISSION, a state agency; and DOES 1 through 50, inclusive, Defendants. CALIFORNIA STATE LANDS COMMISSION, a state agency, Defendant and Indispensable Party.	Case No. 00AS03293 Complaint filed: 6/19/00 ORDER REGARDING STAY OF PROCEEDINGS (Filed May 17, 2001) The Hon. Talmadge R. Jones

A hearing was scheduled on May 11, 2001, in this matter for plaintiffs' motion for new trial. On May 9, 2001, Attorney Ronald A. Zumbrun submitted a letter to this

Court on behalf of all parties requesting that this Court stay the matter herein as a result of Judge Charles C. Kobayashi's May 8, 2001, Order Granting Plaintiffs' Motion for Summary Adjudication in the related matter of ***Marine Forests Society v. California Coastal Commission***, Sacramento County Superior Court, Case No. 00AS00567. A copy of the order is attached hereto as Exhibit 1.

Judge Kobayashi granted plaintiffs' motion for summary adjudication on the separation of powers argument. In his order, Judge Kobayashi enjoined the Commission from denying or conditioning permits or issuing cease and desist orders. Pursuant to Article III, § 3.5 of the California Constitution, a state agency must continue to comply with an unconstitutional statute until such time as the statute's unconstitutionality is determined by an appellate court. In issuing his order, Judge Kobayashi stayed the enforcement of the Court's May 8, 2001, order and the Coastal Commission's pending cease and desist order against the Marine Forests Society. As the said cease and desist order is the subject of the action herein, I hereby order the proceedings in this case and the enforcement of said cease and desist order stayed pending full appellate review of Case No. 00AS00567.

IT IS SO ORDERED.

DATED: May 17, 2001.

/s/ Talmadge R. Jones [SEAL]
THE HON. TALMADGE R. JONES

APPROVED AS TO FORM:

/s/ Lisa Trankley
LISA TRANKLEY
Deputy Attorney General

EXHIBIT 1

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JEFFERY B. YAZEL, SBN 210057
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Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

MARINE FORESTS SOCIETY, a nonprofit corporation; and RODOLPHE STREICHENBERGER, an individual and taxpayer,

Plaintiffs,

v.

CALIFORNIA COASTAL COMMISSION, a state agency; CALIFORNIA DEPARTMENT OF FISH AND GAME, a state agency; PETER DOUGLAS, an individual; SUSAN HANSCH, an individual; CHRIS KERN, an individual; DENNIS BEDFORD, an individual; and DOES 1 through 50, inclusive,

Defendants.

CALIFORNIA STATE LANDS COMMISSION, a state agency,

Defendant and Indispensable Party.

Case No. 00AS00567

Complaint filed: 1/31/00
First Amendment: 5/10/00
Second Amendment: 8/31/00

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION

(Filed May 8, 2001)

Date: 4/24/01
Time: 2:00 p.m.
Dept.: 53

The Hon. Charles C. Kobayashi

The cross-motions for summary adjudication based on stipulated facts of plaintiffs Marine Forests Society and Rodolphe Streichenberger and defendant California Coastal Commission came on regularly for hearing on April 24, 2001, with the Court issuing its tentative ruling on April 23, 2001. Defendant having objected to the court's tentative ruling, appearances were made on behalf of all parties. Plaintiffs appeared by and through their attorneys of record, Ronald A. Zumbrun and Jeffery B. Yazel of The Zumbrun Law Firm. Defendant appeared by and through its attorneys of record, Deputy Attorneys General Lisa Trankley and J. Matthew Rodriquez. Upon consideration of the motions and responding papers, and after oral argument, and good cause appearing therefor:

IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs' motion for summary adjudication be granted. The Court, after oral argument, affirms its tentative ruling as follows:

> "This matter comes before the court as a matter of law to be determined on a settled statement of facts. Plaintiffs and defendants each seek summary adjudication. The question before the court is whether the California Coastal Commission violates the separation of powers provision of the constitution. The parties have cited, and the court knows of, no authority that is directly on point.
>
> "Plaintiffs' motion for summary adjudication is granted.
>
> "The California Constitution expressly provides for the separation of governmental powers among the three branches of government. The powers of state government are legislative, executive, and judicial. Persons charged with the

exercise of one power may not exercise either of the others except as permitted by this Constitution. (Cal. Const., art III, 3) The purpose of separation of powers is to protect individual liberty by preventing concentration of powers in the hands of any one individual or body. (Buckley v. Valeo (1976) 424 U.S. 1, 122)

"The California Constitution also provides at Article V, section 1 that the supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed.

"Plaintiffs here allege that the California Coastal Commission's (CCC) activities are in violation of the provisions of Article III section 3 and Article V section 1 of the constitution. They contend that CCC is a legislative agency because two-thirds of its voting members are appointed by, and serve at the pleasure, of the legislature.

"As defendants point out, it is well established that the separation of powers doctrine does not prevent the establishment of executive agencies that are "hybrid" in nature because they exercise limited quasi-judicial and/or quasi-legislative functions. It is further well established that the legislature has the power to appoint certain commissioners and agency board members. The simple fact that the legislature retains powers of appointment of commission members does not by itself offend the separation of powers. However, a separation of powers violation occurs where the exercise of the power of one branch of government defeats or materially impairs the authority of another branch. (Obrien v. Jones (2000) 23 Cal.4th 40).

"The California Coastal Commission is unique in its composition. While identifying a plethora of executive agencies and commissions where some of the members are appointed by the legislature, defendants have identified no other present-day commission where the majority of the members are appointed by the legislature and no other statute where appointees serve at the pleasure of the legislature. In Parker v. Riley (1941) 18 Cal.2d 83, the court was faced with a separation of powers challenge to the California Commission on Interstate Cooperation, the majority of whose members comprised members of the legislature. No constitutional violation was found because the duties of the commission were incidental to the legislative power. However, in dicta, the court did express concern regarding improper expansion of legislative power.

"The Coastal Commission is in the Resources Agency. The secretary of the Resources Agency is a non-voting member of the commission. She has no jurisdiction over the commission. The enabling legislation makes the Coastal Commission an independent body. The members of the commission have the power to appoint their executive director, who is exempt from civil service provisions; promulgate rules and regulations; and issue permits and cease and desist orders regarding matters within their jurisdiction. The commission may also apply for and accept grants, appropriations, and contributions in any form.

"Plaintiffs also rely on the reasoning of California Radioactive Materials Management Forum v. Department of Health Services. (1993) 15 Cal.App.4th 841 CRMMF). There, the Third District Court of Appeal held that the Senate Rules

Committee violated the separation of powers when it used its appointment power to inject itself into the process of Department of Health Services hearings. Defendants seek to distinguish this and the other cases where courts have found constitutional violations on factual and legal grounds. They contend that the violation in CRMMF occurred not because of the appointment power but because of the interference in the process. They further contend that plaintiffs effectively seek a determination of a hypothetical question because there is no evidence that the legislature has ever used its power to terminate a commissioner. They exhort the court to examine the question pragmatically. They contend that there is little likelihood that the CCC would usurp the Commission's executive or quasi-judicial functions. They rely for this contention on the facts that the statute provides a system of checks and balances within the appointments scheme in its requirements that the Senate Rules Committee, the Speaker and the Governor each appoint four members and that there is geographical diversity and local nomination of local representatives.

"The court does not find defendants persuasive. The question is not hypothetical. The system of checks and balances does not give adequate protection. Neither the fact that the power is dispersed among the legislative branches nor the geographical diversity changes the fact that eight of its members are appointed and subject to at-will dismissal by the legislative branch of government.

"In Obrien supra the majority decision relied heavily on the fact that the court retained its inherent power as the final decision-maker on disciplinary matters. Here. [sic] The Coastal commission

> has wide powers, only a limited number of which are subject to limited judicial review. Purportedly an executive agency, the Commission is answerable to no one in the Executive. The members are not directly answerable to the voters. The legislature has retained for itself the power of appointment and dismissal at its pleasure. The Coastal Commission is effectively a legislative agency. Comity and pragmatism cannot save it. The judicial and executive powers that it exercises are not incidental to the law making power. They are not properly under the jurisdiction of the legislature."

Accordingly, it is ordered that plaintiffs' motion for summary adjudication is granted in favor of plaintiffs Marine Forests Society and Rodolphe Streichenberger and against defendant California Coastal Commission. Pursuant to Code of Civil Procedure §§ 526 and 526a, defendant as a legislative body is enjoined from exceeding its jurisdiction and violating the Separation of Powers Clause of the California Constitution which precludes it from granting, denying or conditioning permits or issuing and hearing cease and desist orders.

Recognizing that under Proposition 5, adopted by the California electorate in 1978 (Calif. Const. art. III, § 3.5), a state agency must continue to comply with an unconstitutional statute until such time as the statute's unconstitutionality is determined by an appellate court, and pursuant to the agreement of the parties, it is further ordered that the enforcement of this order and the California Coastal Commission's cease and desist order

against Marine Forests Society be stayed pending completion of all appellate review.

DATED: MAY -8 2001.

CHARLES C. KOBAYASHI
THE HON. CHARLES C. KOBAYASHI